Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1994

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

WILLIAM MURPHY, Acting Director Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a federal court abstain from considering a patient's federal constitutional challenge to a state mental hospital's decision to restrict the patient's liberty under Younger v. Harris, 401 U.S. 37 (1971), because of the availability of a state forum in which the patient could have, but did not, challenge this restriction?

2. Does a state's decision to retain jurisdiction over persons acquitted by reason of insanity and to subject review of their treatment and release to state courts render a federal court challenge by an insanity acquittee to the conditions of his confinement an interference with a state criminal prosecution subject to abstention under Younger v. Harris?

3. Should this Court's decision in Heck v. Humphrey, 114 S.Ct. 2364 (1994), that a convicted prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or sentence has been reversed, be extended to a decision by a state mental hospital to restrict the liberty of a patient confined in that hospital whenever state law provides that the conditions of confinement may be supervised by state courts?

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1994

WAYNE NELSON and
ANTHONY MANOS, *Petitioners,*

v.

WILLIAM MURPHY, Acting Director, Illinois Departmentof Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Illinois Department of Mental Health and Developmental Disabilities, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Wayne Nelson and Anthony Manos respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 13, 1995.

OPINIONS BELOW

The judgment and opinions of the United States Court of Appeals for the Seventh Circuit of which review is sought are reported at 44 F. 3d 497 (7th Cir. 1995).[1] Appendix at A-1. The opinions of the Court of Appeals upon Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc are reported at 44 F. 3d at 504 (7th Cir. 1995). Appendix at A-14.

The opinion of the United States District Court for the Northern District of Illinois is unreported. Appendix at A-17. The report and recommendation of the Magistrate Judge is also unreported. Appendix at A-42.

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[1]The names of all parties to the present Petition for Writ of Certiorari appear on the cover. The same parties were involved in the proceedings before the United States Court of Appeals and the United States District Court. None of the parties to this litigation are corporations.

JURISDICTION OF THIS COURT

The final judgment of the United States Court of Appeals for the Seventh Circuit of which review is sought was entered on January 4, 1995. Nelson v. Murphy, 44 F. 3d 497 (7th Cir. 1995). Appendix at A-1. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed with that court on January 18, 1995. The panel majority denied the Petition for Rehearing on March 13, 1995. Nelson v. Murphy, 44 F. 3d at 504. Appendix at A-14. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

730 ILCS 5/5-2-4. Due to its length, the full text of this Illinois statute is set forth in the Appendix at B-1.

STATEMENT OF THE CASE

Petitioners Wayne Nelson and Anthony Manos brought this action in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief against Respondents William Murphy, Roalda Alderman and Terry Brelje, officials of the Illinois Department of Mental Health and Developmental Disabilities ("the Department"). Petitioners claimed that they were deprived of their liberty in violation of the Due Process Clause of the Fourteenth Amendment when Respondents summarily and permanently terminated their right to go outside the living quarters of the Elgin Mental Health Center. Petitioners claimed that this deprivation of liberty was not based upon the exercise of

individualized professional judgement in violation of this Court's holding in Youngberg v. Romeo, 457 U.S. 307 (1982). Jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1131, 1343, 2201 and 2202.

Petitioners Nelson and Manos were acquitted by reason of insanity by the Circuit Court of Cook County, Illinois. (A-2)[2] Both Petitioners were committed to the custody of the Department for an indefinite period pursuant to 730 ILCS 5/5-2-4, the Illinois law governing the confinement of insanity acquittees. Petitioners were both confined at Elgin Mental Health Center, a mental hospital operated by the Department. (A-49)

Illinois law permits insanity

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[2] All factual references are to the opinions of the District Court or the Seventh Circuit set forth in the Appendix.

acquittees to go unaccompanied on the grounds of the mental hospital in which they are confined, but only when the facility director recommends such a grounds pass and the court which presided over their acquittal approves the recommendation. 730 ILCS 5/5-2-4(b). Both Petitioners were recommended for grounds passes by Respondent Alderman and both recommendations had been approved by the respective judges who presided over their acquittals. (A-53, 55-56)

State proceedings

On May 30, 1990, Respondents terminated the grounds passes of all the approximately 80 patients at Elgin who had such passes. (A-58) Both Petitioners were among those who had their grounds passes discontinued. (A-58,59) Respondents notified circuit

court judges by letter that it had terminated Petitioners' passes. (A-91) However, since Illinois law only requires circuit court approval prior to the issuance of passes and not prior to their termination, 730 ILCS 5/5-2-4(b), circuit courts played no role in the termination of Petitioners' passes. (A-59)

Several weeks later, Respondent Alderman requested permission of the circuit courts pursuant to 730 ILCS 5/5-2-4(b) to issue a much more limited grounds pass to some patients, including Petitioner Nelson, to be effective once Elgin had constructed a fence. (A-60,61,62) Petitioner Nelson's new restricted pass was approved by the court in a proceeding in which he did not participate. (A-39)

Federal District Court Proceedings

In July, 1990, Petitioners filed the present claim in the United States District Court pursuant to 42 U.S.C. §1983, alleging that they had been deprived of their liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners also filed a motion for a preliminary injunction and for certification of a class comprised of all of the patients whose passes had been terminated.[3]

Petitioners alleged that Respondents terminated Petitioners' passes without exercising their

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[3] The motion for class certification was filed immediately after the initiation of the present action, was fully briefed by the end of 1990 and Petitioners made two formal written requests pursuant to N.D.Ill. R. 12(Q) that the District Court judge rule on their motion. However, the court failed to do so and a class was never certified. (A-3)

individualized professional judgment. That is, the blanket pass termination was based upon escapes from Elgin Mental Health Center. (A-91) However, the number of escapes from Elgin had been declining prior to the termination of Petitioners' passes. (A-92) Additionally, just prior to the pass termination the Respondents had individually reviewed the suitability of each patient to continue using his or her pass and had found that the Petitioners should continue to have passes. (A-93,94)

Respondents claimed that the passes were merely suspended pending the construction of a fence surrounding part of the grounds of Elgin Mental Health Center. (A-59,60) However, although the fence was completed in March, 1991 (A-60), to date no insanity acquittee has

had his or her pass reinstated. (A-61, 62)

Following a hearing, Magistrate Judge Rebecca Pallmeyer issued a Report and Recommendation that Petitioners be granted a preliminary injunction. The injunction would require Respondents to exercise their individualized professional judgment concerning the suitability of each class member for a pass. (A-114) Although Respondents filed a timely objection to this decision with District Judge John A. Nordberg, they did not contest the Magistrate Judge's findings of fact.

On March 9, 1994, District Judge Nordberg dismissed Petitioners' claim, finding that abstention was appropriate under Burford v. Sun Oil, 319 U.S. 315 (1943). (A-25,40) The court, therefore, never reached the merits of Petitioners'

claim. The district court rejected Respondents' claim that abstention was required under Younger v. Harris, 401 U.S. 37 (1971), because Petitioners did "not seek to enjoin any state court proceeding." (A-24,25)

Seventh Circuit Proceedings

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. The court unanimously agreed with Petitioners that abstention was not appropriate under Burford v. Sun Oil, Nelson v. Murphy, 44 F. 3d 497, 501, 503 (1995). However, the panel majority affirmed the decision to dismiss Petitioners' complaint, finding that Younger abstention was appropriate. The court held that Younger abstention was appropriate because Petitioners could have challenged the Respondents' decision to terminate their passes by

requesting review of this decision in the circuit courts of Illinois: "Instead of presenting objections to their treatment plans, plaintiffs filed an independent suit in federal court." Nelson, 44 F.3d at 501. "Plaintiffs had, and did not use, a state forum in which they could have presented the arguments they now urge." Nelson, 44 F.3d at 503.

The court also based its holding on the fact that Petitioners "were active litigants in state court" since they had both obtained other forms of relief from the circuit courts of Illinois. Id. at 501. The Seventh Circuit also held that Heck v. Humphrey, 114 S.Ct. 2364 (1994), which "holds that a prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or

sentence has been reversed", should be extended to prevent a suit for monetary damages challenging "conditions of confinement that are actively supervised by state courts." even when the plaintiff has not challenged those conditions in state court. Nelson, 44 F.3d at 502.

Finally, the panel majority relied upon Deakins v. Monaghan, 484 U.S. 193 (1988), to dismiss Petitioners' damage claims. The court reasoned that Petitioners could have brought their damage claims in criminal court together with a challenge to the Respondents termination of their passes and that "judges of the circuit courts are empowered to provide both remedies." Nelson, 44 F.3d at 502.

Judge Cudahy dissented from the Seventh Circuit's holding abstaining

under the Younger doctrine. He argued: (1) "there are at worst parallel proceedings and there is no showing that federal proceedings will, 'damage the state interest'"; (2) "there are no ongoing or pending state proceedings to be interfered with" since "it was the Department which decided to remove passes without individual review"; and (3) "the fact that there may be a state remedy in existence but not invoked is certainly not grounds for Younger or any other species of abstention." Nelson, 44 F.3d at 503-04

On March 13, 1995, the Seventh Circuit denied Petitioners' Petition for Rehearing with Suggestion for Rehearing En Banc. The panel issued a brief new opinion. 44 F.3d at 504. Judge Cudahy reaffirmed his dissent "from the remarkable conclusion that Younger

abstention could apply when there was no federal attempt to enjoin a state proceeding, and, in fact, where there was no ongoing or pending state proceeding with which to interfere." 44 F.3d at 505.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS IN APPLYING YOUNGER ABSTENTION TO A §1983 CLAIM INVOLVING THE CONDITIONS OF CONFINEMENT IN A STATE INSTITUTION

Petitioners, who were committed to a state mental hospital following acquittal by reason of insanity, brought the present suit to challenge a decision of the Respondents, officials of the state mental health department, substantially restricting Petitioners' liberty at that hospital. Petitioners alleged that this decision violated

their rights under the Due Process Clause of the Fourteenth Amendment. Because Petitioners could have, but did not, challenge the restriction on their liberty in state court and because Petitioners have been involved in other litigation in state court concerning other aspect of their confinement by Respondents, the Seventh Circuit dismissed Petitioners' claim.

The Seventh Circuit's dismissal was predicated upon its opinion that it was required to abstain under this Court's decision in Younger v. Harris, 401 U.S. 37 (1971). In Younger this Court held that principles of comity prevented a federal court from enjoining a state court prosecution. The Seventh Circuit's application of the Younger doctrine conflicts with decisions of other circuits in three ways. First,

Younger abstention has been rejected when, as in the present case, the federal plaintiffs, although participants in state court litigation, were not defendants there.[4] Second, federal courts have consistently held that conditions of confinement litigation does not require Younger abstention because it does not interfere with state jurisdiction over individual confined persons. Third, the Seventh Circuit's decision conflicts with decisions of the D.C. Circuit that Younger abstention should not be employed when the state court proceedings could not afford the relief requested in federal court.

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[4] For the reasons set forth in Argument VI(B) below, Petitioners dispute any suggestion that they were participants in any relevant state court litigation. However, even if they were, the Seventh Circuit's decision conflicts with decisions of this Court and other circuits courts.

A. The Seventh Circuit's Decision Conflicts With The Third Circuit As To Whether Younger Abstention Is Appropriate When The Federal Plaintiffs Are Not The State Defendants

The Seventh Circuit decision found Younger abstention appropriate even though Petitioners were not defendants in the state court proceedings. This decision conflicts with decisions of the Third Circuit which limit Younger abstention to cases in which the federal plaintiffs were defendants in state court.

For example, in Harris v. Pernsley, 755 F. 2d 338, 344 (3rd Cir. 1985), the court held that Younger abstention was inappropriately applied to a federal conditions of confinement lawsuit brought by prison inmates, in spite of a pending state court suit about conditions of confinement. Since the

state officials were defendants in the state proceeding "rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies", Younger abstention was held inapplicable. Similarly, in Marks v. Stinson, 19 F.3d 873 (1994), the Third Circuit rejected Younger abstention even though the federal plaintiffs were seeking identical relief in contemporaneous proceedings in state court. The "mere pendency of an action in state court is no bar to proceedings concerning the same subject matter in the Federal court having jurisdiction." Marks, 19 F.3d at 882. Since Petitioners were not defendants in any relevant state proceeding, the Seventh Circuit's holding conflicts with Harris and Marks.

The Seventh Circuit suggested that its abstention decision may have been

based upon one or more of three state court "proceedings". However, in two of these state court proceedings the present Petitioners were not defendants and the third proceeding involving Petitioners had ended long before the present litigation began.

First, the Seventh Circuit bases its abstention decision on the fact that "[b]oth Nelson and Manos were active litigants in state court. As we have recounted, Nelson was especially active; he sought and obtained an order releasing him from confinement altogether in 1993." 44 F.3d at 501. However, Petitioner Nelson was the moving party in this state court proceedings seeking his conditional release. Thus, Nelson was not a defendant in this proceeding.

Second, the Seventh Circuit may

have based its abstention decision on the fact that Petitioners could have sought review of the treatment reports filed "every 60 days [by] the staff of Elgin." 44 F.3d at 501. The Seventh Circuit explains that "either [Petitioner] could have opposed the implementation of the new plan on constitutional grounds...no one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised here." Id. However, in the treatment plan review proceedings described by the Seventh Circuit, Petitioners would again have been the moving party seeking to challenge in state court a decision made by state government officials pursuant to 730 ILCS 5/5-2-4 and 405 ILCS 5/3-814.

Finally, Petitioners were

defendants in the criminal proceedings which led to their acquittal by reason of insanity, and following a separate hearing, their commitment to the custody of Respondents. However, as will be discussed more fully in section III below, these proceedings had long since terminated and their use to invoke Younger abstention conflicts with other precedents of this Court.

Thus the decision of the Seventh Circuit directly conflicts with two decisions of the Third Circuit. The Seventh Circuit finds that non-contemporaneous state proceedings in which the Petitioners were not the defendants can justify Younger abstention, while the Third Circuit finds that Younger abstention is inappropriate when the federal plaintiffs were not defending themselves

in contemporaneous state court proceedings seeking the same relief.

B. The Seventh Circuit's Opinion Conflicts With The Sixth Circuit Concerning The Application Of Younger Abstention To Conditions Of Confinement Litigation.

The decision below applied Younger v. Harris, 401 U.S. 37 (1971), abstention to Petitioners' claims because "an inmate already participating in state litigation must make his stand there rather than...filing an independent §1983 suit", Nelson, 44 F.3d at 503. This holding was premised on the assumption that important state interests are compromised by the "transfer of adjudication from the original state forum to the federal forum". Id at 502.

The Sixth Circuit has rejected Younger abstention under circumstances which are identical in all relevant

respects to the present action. In Hanna v. Toner, 630 F. 2d 442, 446 (6th Cir. 1980), the court rejected the application of Younger to a dispute about the conditions of confinement in a juvenile detention facility. The Hanna court noted that the federal case "represents no interference or intervention in state judicial processes, criminal or otherwise". Id. While the Ohio courts had continuing jurisdiction over those adjudicated delinquent, federal scrutiny of the §1983 complaint about the conditions of confinement in the facility was considered perfectly appropriate. This holding is in conflict with the decision below, which holds that Younger bars such scrutiny, Nelson, 44 F.3d at 502.

C. The Seventh Circuit's Decision Conflicts with Decisions of the D.C. Circuit in Applying Younger Abstention Despite the Absence of an Adequate State Forum for Adjudicating Systemic Problems.

The Seventh Circuit recognized that the circuit courts of Illinois were not available to consider challenges to systemic problems concerning the conditions of confinement of persons such as the Petitioners who are in custody after an insanity acquittal. Nelson, 44 F.3d at 501. In doing so the Seventh Circuit relied upon People v. Roush, 101 Ill.2d 355, 462 N.E.2d 468 (1984), a decision of the Illinois Supreme Court which so held. Despite this, the Seventh Circuit found that Younger abstention was appropriate. This decision conflicts with two decisions of the D.C. Circuit.

In LaShawn A. v. Kelly, 990 F.2d

1319, 1322 (D.C. Cir. 1993), the court applied the "questionable vehicle" test of Family Division Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984). In Family Division the D.C. Circuit questioned the "need or wisdom of extending Younger to all constitutional claims that might be adjudicated in state as well as federal courts", Family Division, 725 F.2d at 702. In LaShawn there were ongoing delinquency proceedings in state court. These courts had the ability to consider all of the claims brought in federal court. However, the D.C. Circuit held that the District of Columbia proceedings involving the fate of individual children were questionable vehicles for challenges to the conditions of custody of children in foster care. As a result, Younger abstention was

unwarranted. The decision of the Seventh Circuit conflicts with these decisions because the Seventh Circuit applied Younger abstention despite the unavailability of an appropriate state forum.

II. THE SEVENTH CIRCUIT'S DECISIONS OF THIS COURT THAT CLAIMS UNDER 42 U.S.C. §1983 ARE NOT SUBJECT TO AN EXHAUSTION REQUIREMENT.

The Seventh Circuit dismissed Petitioners' claim for injunctive relief under 42 U.S.C. §1983 because Petitioners failed to exhaust their available state remedies. While purporting not to require Petitioners to exhaust their state remedies, Nelson, 44 F.3d at 502, the Seventh Circuit in fact dismissed Petitioners' claims because they "had, and did not use, a state forum in which they could have presented the arguments they now urge. Their

deliberate bypass of the opportunity to litigate in state court foreclosed them from litigating in federal court." Nelson, 44 F.3d at 503.

There is no exhaustion requirement in §1983 actions. Felder v. Casey, 487 U.S. 131, 147-48 (1988); Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982). Moreover, the Supremacy Clause obligates state courts to entertain §1983 claims. Howlett v. Rose, 496 U.S. 356, 367 (1990). Thus, if the availability of a state forum to consider §1983 litigation were relevant to abstention, federal judges would always would be required to abstain from entertaining §1983 claims. Therefore, the Seventh Circuit's decision conflicts with this Court's holding that there is no exhaustion requirement.

III. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT THAT PERSONS WHO ARE ACQUITTED BY REASON OF INSANITY MAY NOT BE PUNISHED.

The Seventh Circuit also bases its Younger abstention decision on the fact that "the cases pending in state court are continuations of the original criminal prosecutions and preserving a state's right to litigate criminal cases in its own courts is the core of the Younger doctrine." Nelson, 44 F.3d at 502. This holding conflicts with the holdings of this Court that confinement following acquittal by reason of insanity is not punitive in nature, but rather for treatment and the protection of society.

In Jones v. United States, 463 U.S. 354, 369 (1983), this Court rejected a claim that insanity acquittees not be confined in excess of the criminal

sentence they would have served if convicted. The Court explained: "Different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished." Similarly, in Foucha v. Louisiana, 112 S.Ct. 1780, 1785 (1992), the Court held that confinement of those found not guilty by reason of insanity after they ceased to be mentally ill violated due process because an acquittal by reason of insanity ended the State's interest in punishing the defendant.

Additionally, Illinois has demonstrated that it does not intend to permit the criminal commitment of insanity acquittees. That is, it sharply distinguishes between persons found not guilty by reason of insanity, who may be confined, if at all, only in

a mental hospital, 730 ILCS 5/5-2-4(a); and persons found "guilty but mentally ill" who may be sentenced to imprisonment just like any other convicted defendant. 730 ILCS 5/5-2-6. Indeed, the latter group may be sentenced to death. People v. Crews, 122 Ill.2d 266, 522 N.E.2d 1167 (1988).

Moreover, even though not required by the Due Process Clause, Jones, 463 U.S. at 366, Illinois prohibits confinement of insanity acquittees unless, following a separate hearing at which the state is required to establish that acquittee meets the criteria for commitment. 730 ILCS 5/5-2-4(a). In short, Illinois has disavowed any intention to treat the judicial supervision of insanity acquittees following their commitment as a "continuation of the original criminal

prosecution." Therefore, the Seventh Circuit justification of Younger abstention based upon Petitioner's earlier acquittal by reason of insanity, Nelson, 44 F.3d at 501, conflicts with this Court's decisions in Jones and Foucha, finding that the confinement of insanity acquittees cannot be part of a scheme of punishment.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN GERSTEIN V. PUGH AND WITH THE DECISION OF THE EIGHTH CIRCUIT IN COLEY V. CLINTON

The decision below also conflicts with Gerstein v. Pugh, 420 U.S. 103, 108 (1975). There, this Court rejected a Younger abstention argument because the injunction sought was "not directed at the state prosecutions as such" and the federal case involved "an issue that could not be raised in defense of the criminal prosecution" which "could not

prejudice the conduct of the trial on the merits". All three of these factors apply in the present case as well. Conditions of confinement litigation has nothing to do with criminal prosecutions. If, as Magistrate Judge Pallmeyer recommended, Petitioners received injunctive relief, that relief would not interfere with any state proceedings involving the Petitioners or the Respondents. Requiring the Respondents to give individualized consideration to Petitioners' eligibility for passes will have no effect on any existing or past state litigation. That is because Illinois courts are only required to review and approve decisions by the Respondents to grant additional liberty, not decisions by Respondents to take away Petitioners' liberty. 730 ILCS 5/5-2-4(b). Thus, the

injunction sought by Petitioners, like that sought in Gerstein, may simply cause the state courts to have **additional** proceedings to review recommendations for passes which are likely to result from the exercise of individualized professional judgment by Respondents.

Gerstein has been applied to facts quite similar to those present here. In Coley v. Clinton, 635 F.2d 1364, 1372 (8th Cir. 1980), the Eighth Circuit was faced with a challenge to the conditions of confinement imposed upon insanity acquittees in Arkansas. The court rejected Younger abstention, explaining:

> The Younger restriction on federal court interference with ongoing state court proceedings closely related to the criminal law, however, does not apply to actions against state officials which are not part of such ongoing state court criminal proceedings.(citing Gerstein, 420 U.S. at 108).

Petitioners' claim does not interfere with state criminal proceedings, since those proceedings terminated with Petitioners' acquittal. Therefore, the Seventh Circuit's decision conflicts with both Gerstein and Coley.

V. THE SEVENTH CIRCUIT'S DECISION WILL AFFECT THE RIGHT OF THOUSANDS OF PATIENTS IN STATE INSTITUTIONS TO CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT IN FEDERAL COURT

The Seventh Circuit based its abstention decision on the fact that Illinois had created a system under which the state courts could supervise the treatment and conditions of confinement of insanity acquittees such as Petitioners. Nelson, 44 F. 3d at 501. However, this rationale applies equally well to thousands of other persons who have claims that their conditions of confinement violate the United States

Constitution. Many other states have arrangements in which the state courts monitor the conditions of confinement, not only for insanity acquittees but also for every other person committed to state mental hospital, as well as persons confined in prisons, jails and juvenile facilities.

A) Many States Require Continuing State Court Involvement in the Treatment and Conditions of Confinement of Insanity Acquittees.

Many states have statutory provisions governing the treatment of insanity acquittee similar to those of Illinois. For example, the California Penal Code provides for court review of various conditions of confinement. For an insanity acquittee to transfer from one mental health facility to another, for instance, the director must submit a written recommendation to the court,

which can then order the transfer. Cal. Pen. Code 1026(c) (1995). In addition, the director "shall, at six-month intervals, submit a report in writing to the court...setting forth the status and the progress of the defendant." Id. The court is responsible for ensuring that the conditions of confinement continue to conform to the patient's program of treatment. Cal. Pen. Code 1026.2(b) (1995).

Numerous other states have similar laws. Examples include: Tenn. Code 33-7-303 (1994)(Committing court must monitor treatment plans.); Alaska Stat. 12.47.090 (1994) (periodic written reports to committing court of the condition of the patient required); Arizona Rev. Stat. 13-3994 (1994) (court hearing required within 75 days of commitment); Ohio Rev. Code

2945.40(F)(1994) (court must have hearing and determine whether mental health facility may transfer and alter other conditions of confinement). Thus, the reasoning of the Seventh Circuit applies to a substantial number of persons all across the United States who are confined in state institutions following acquittal by reason of insanity.

B) Many States Require Continued State Court Involvement For All Persons Involuntarily Confined in State Hospitals.

Many states also provide for continuing state court involvement in the conditions of confinement and treatment of everyone confined in state hospitals, including patients who have no previous involvement in the criminal justice system. For example, the statutory provision for judicial

supervision of insanity acquittees in Illinois, relied upon by the Seventh Circuit, incorporates by reference a provision which applies to everyone who is involuntarily committed. That statute reads:

> Not more than 30 days after admission..., the facility director shall file a current treatment plan with the court which includes an evaluation of the recipient's progress and the extent to which he is benefitting from treatment. The court shall review the treatment plan. 405 ILCS 5/3-814.

Similarly, Rhode Island law requires that the quality of care and the patient's treatment plan be reviewed every ninety days, and that this review be entered into the patient's record for review. R.I. Gen. Laws 40.1-5-10 (1994). Florida law requires that any treatment not consented to be submitted to and ordered by the court. Fla. Stat.

916.107(3)(a)(3). (1994). See also Ariz. Rev. Stat. 36-540.01-02 (1994) (court shall order least restrictive treatment, and shall be presented with and approve written treatment plan), and Ohio Rev.Code 5122.15 (1994) (court shall order placement in least restrictive environment at submission of facility or person). If the Seventh Circuit decision is given its potential reach, a substantial proportion of the mentally ill in the United States would be barred from bringing §1983 claims contesting unconstitutional conditions of confinement in a federal forum.

C) The Seventh Circuit's Holding Could Foreclose Federal Jurisdiction over Conditions of Confinement Litigation Brought by Juveniles, Pretrial Detainees and Convicted Prisoners.

Finally, there is nothing to distinguish the circumstance of the

present case from other areas of the law, such as family law, foster care, and other custodial situations, where there is ongoing review by state courts. Such review already exists for juveniles. See LaShawn A. v. Kelly, 990 F.2d 1319, 1323 (D.C. Cir. 1993) (rejecting Younger abstention despite District of Columbia court review every six months). Under the Seventh Circuit's reasoning, a state can prevent the federal courts from considering constitutional challenges to the conditions of confinement by providing a state forum to consider such claims. This rule could affect pre-trial detainees and convicted prisoners. Both groups have frequently brought claims involving conditions of confinement to federal courts. Farmer v. Brennan, 114 S.Ct. 1970 (1994); Wilson v. Seiter, 111

S.Ct. 2321 (1991). This Court should grant the present petition to review the remarkable conclusion that constitutional challenges to conditions of confinement may no longer be brought in federal court so long as the state provides a forum for such claims.

VI. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN HECK V. HUMPHREY AND WOLFF V. MCDONNELL

Having disposed of Petitioners' claim for injunctive relief on abstention and exhaustion grounds, the Seventh Circuit then dismissed the petitioners' claim for damages on the grounds that Heck v. Humphrey, 114 S.Ct. 2364 (1994), supported an exhaustion requirement for conditions of confinement litigation when the conditions complained of are "actively supervised by state courts." Nelson v.

Murphy, 44 F.3d 497, 502 (1995).[5] This application of Heck directly conflicts with Wolff v. McDonnell, 418 U.S. 539 (1974), as recently affirmed in Heck, 114 S.Ct. at 2370. Heck held that §1983 claims should not be dismissed by a federal court if the plaintiff's action, even if successful, will not demonstrate the invalidity of any underlying state court criminal judgment. Heck, 114 S.Ct. at 2370. Moreover, the Court of Appeals' extension of Heck to a civil claim challenging an administrative decision unrelated to the fact or duration of confinement is unsupported by the language of Heck, and represents

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[5] The decision to dismiss Petitioners' claim for damages also conflicts with the decision of the Fifth Circuit in Alexander v. Ievoub, ---F. 3d---, 1995 U.S.App. LEXIS 12152 (May 19, 1995) (Younger abstention inappropriate despite pendency of state forfeiture proceeding and state damage action because Younger does not apply to claims for damages only).

a radical break with the uniform treatment of Heck by other circuit courts. This court should grant certiorari to resolve this conflict and clarify the continuing validity of Wolff v. McDonnell.

A. The Seventh Circuits' Dismissal of Petitioners' § 1983 Damages Claims Conflicts with Wolff v. McDonnell and Heck v. Humphrey Because Petitioners Can Prevail on the Present Damage Claim Without Challenging the Validity of Any State Court Judgment.

Heck holds that, if a "plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed...." 114 S.Ct. at 2372. The Seventh Circuit's dismissal of Petitioners' §1983 damages claim conflicts with this holding. Success on Petitioners' claim for damages would

require proof that the procedures followed in removal of grounds passes were inadequate, and that the petitioners suffered harm from this denial of due process. Neither of these elements would imply that a state court decision--criminal or otherwise--is unlawful. The Seventh Circuit's decision, therefore, is in direct conflict with both Heck and Wolff.

Wolff v. McDonnell, as recently affirmed in Heck v. Humphrey, demonstrates that even where dismissal of an injunctive claim may be appropriate, under Heck a claim for damages should be heard. See Heck, 114 S.Ct. at 2370. The Wolff plaintiff sought damages and injunctive relief under §1983 on the grounds that the procedures for deprivation of his good time credits were constitutionally

inadequate. Wolff, 418 U.S. at 553. The Wolff court affirmed the dismissal of the plaintiff's injunctive relief, but held that the damages claim was properly before the court. Id. at 554-55. Success on the damages claim "did not call into question the lawfulness of the plaintiff's continuing confinement," since using the wrong procedures did not necessarily vitiate the denial of good-time credits. Heck, 114 S.Ct. at 2370. The plaintiff could win on his procedural claim even if the denial of credits itself was entirely lawful. Id. The claim would therefore have no preclusive effect on a state court's decision regarding the lawfulness of confinement, and the comity concerns underlying Heck would be inapplicable. Id.

The Seventh Circuit seems to have

applied Heck under the assumption that a state court had approved Respondents' termination of Petitioners' passes.[6] The Seventh Circuit then found that, under Heck, the state court proceeding prevent the present damage claim. This extension was based upon the Seventh Circuit's view that, in order to prevail in the present damage claim, Petitioners would have to demonstrate that the state court's "approval" was invalid. However, this view is simply incorrect.

Respondents terminated Petitioners' passes suddenly and without process. (A-59) The Seventh Circuit's decision rests on the assumption that this pass termination was later approved by a state court. However, even if the state

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[6] For reasons discussed below in Argument VI(B), no state court actually ruled upon the termination of Petitioners' passes.

court's "approval" were correct[7], it would not eliminate Petitioners' claim for damages. Due Process ordinarily requires pre-deprivation process. Zinermon v. Burch, 494 U.S. 113, 127 (1990). Since Respondents have conceded that no emergency existed which would justify the failure to provide such process, Petitioners may prevail on their damage claim even if their injunctive claim no longer has merit. Carey v. Piphus, 435 U.S. 247, 263 (1978).

A supposed state-court approval of the Respondents' termination of passes could foreclose a claim for damages beyond the date of that approval, but it

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[7] Only Magistrate Judge Pallmeyer ever reached the merits of Petitioners' challenge to the termination of their passes. She found for Petitioners and held that this deprivation violated the Due Process Clause of the United States Constitution. (A-114)

would not vitiate a claim, such as the present one, that Respondents violated Petitioners' right to Due Process when they failed to provide them with pre-deprivation procedures. Thus, the Seventh Circuit's holding directly conflicts with this Court's holdings in Wolff and Heck in dismissing Petitioners' damage claim even though the success of that claim did not require the invalidation of any state court decision.

B) The Seventh Circuit's Decision Improperly Extends Heck v. Humphrey to Civil, Non-Judicial State Decisions Not Involving the Fact or Duration of Confinement.

Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), holds that if a plaintiff's federal action will depend for its success on demonstrating the invalidity of any outstanding criminal judgment against the plaintiff, the action should

not be allowed to proceed. The Seventh Circuit has departed from this principle by applying the Heck doctrine to a non-judicial, civil decision involving only the conditions of Petitioners' confinement and not the fact or duration of their confinement.

First, as discussed in Argument III above, the criminal proceedings against Petitioners terminated with their acquittal. Moreover, Illinois law provides that the proceedings governing the confinement and treatment of insanity acquittees are civil. The relevant state statute, 730 ILCS 5/5-2-4(a) incorporates by reference the state civil commitment law, 405 ILCS 5/1-100, et seq., which, in turn, expressly provides that commitment proceedings "are civil in nature." 405 ILCS 5/6-100. Other provisions of the civil

commitment law also refer to its civil nature. 405 ILCS 5/3-802 (selection of jurors); 405 ILCS 5/3-816(b)(appeals). The state court proceedings which were the basis for the application of Heck were civil rather than criminal..

Heck held that dismissal of a §1983 claim is appropriate in only two instances: (i) where a plaintiff attempts to attack the fact of confinement, thereby implicating the validity of the underlying conviction itself; and, (ii) where a plaintiff attempts to attack the duration of confinement, and success on the claim would require a remedy of release from custody. Heck, 114 S.Ct. at 2372. Even if the Heck doctrine should be applied to proceedings to commit someone to a mental hospital, the present Petitioners are not challenging the fact or duration

of their confinement to a mental institution. Rather, they are challenging a decision by the Respondents to terminate grounds passes. No court has ever applied Heck to a claim of this type. Heck has consistently been applied only where a plaintiff's claim would call into question a underlying conviction or sentence. See, for example, Channer v. Mitchell, 43 F. 3d 786 (2nd Cir. 1994)(claim that police officers perjured themselves on stand and coerced witnesses into wrongfully identifying plaintiff as suspect); McGrew v. Texas Board of Pardons & Paroles, 47 F. 3d 158, 161 (5th Cir. 1995)(claim attacking revocation of parole as unlawful confinement).

Finally, Petitioners are not challenging a judicial decision. Thus,

even were Heck to be extended to §1983 claims based on civil judgments and attacking something other than the fact or duration of confinement, dismissal of the Petitioners' damage claim would be erroneous. Petitioners' §1983 claim alleges that the procedures by which their on-grounds and off-grounds passes were removed failed to satisfy the constitutional standard necessary for deprivation of liberty. This deprivation was not caused by state court action but by the unilateral decision of the Respondents.

Nor, contrary to the Seventh Circuit's suggestions, did a state court ever approve of the pass termination. Magistrate Judge Pallmeyer's Report and Recommendation spells out that the Respondents unilaterally decided to

terminate the passes.[8] (A-58) Respondents then informed the relevant state court judges by sending them a letter. However, while Illinois law requires state court approval prior to the issuance of a pass, no state court approval is required for pass terminations. 730 ILCS 5/5-2-4 (b). Indeed, a person contesting the failure of Respondents to issues a pass is not even entitled to a state court hearing. People v. Owens, 269 Ill.App.3d 152, 645 N.E.2d 483 (2nd Dist. 1995). Thus, at no time during the long course of this litigation have Respondents argued that Petitioners federal claim is barred by res judicata or collateral estoppel.

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[8] In this regard the Seventh Circuit's decision also conflicts with the decision of this Court in New Orleans Public Service v. City of New Orleans, 491 U.S. 350, 370 (1989) (requiring judicial type proceedings in order to apply Younger abstention).

Nelson, 44 F. 3d at 503. Nor have Respondents ever produced a transcript or other evidence that such a hearing took place. That is because there were no state court proceedings. Since there were no state court proceedings, Heck is inapplicable.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court to grant this petition for certiorari. Alternatively, Petitioners seek summary reversal of the decision below.

Respectfully Submitted,

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Supreme Court, U.S.
FILED

942053 JUN 8 - 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

WILLIAM MURPHY, Acting Director Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

No. 94-1764

WAYNE NELSON and ANTHONY MANOS,

Plaintiffs-Appellants,

v.

WILLIAM MURPHY, Acting Director of the Department of Mental Health and Developmental Disabilities, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3920—John A. Nordberg, *Judge.*

ARGUED OCTOBER 25, 1994—DECIDED JANUARY 4, 1995

Before CUDAHY, ESCHBACH, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* When a jury in Illinois returns a verdict of not guilty by reason of insanity, the criminal court commits the defendant for a mental examination. 730 ILCS 5/5-2-4(a). If after receiving the results of this examination the judge decides that the person is mentally ill and dangerous, the judge must order the person confined "in a secure setting". *Ibid.* "Such defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted". *Ibid.* Notwithstanding this command, a court may permit a confined

person to move freely on and off the facility's grounds. Every 60 days the director of the mental health facility "shall file a treatment plan with the court. . . . Such plan may . . . include unsupervised on-grounds privileges, off-grounds privileges (with or without escort . . .), home visits and participation in work programs". 730 ILCS 5/5-2-4(b).

Wayne Nelson and Anthony Manos were found not guilty by reason of insanity. Nelson had been charged with murder, Manos with attempted murder. Each was found mentally ill and dangerous, ordered confined "in a secure setting", and sent to the Elgin Mental Health Center. On the recommendation of a treatment plan, both received passes for on- and off-grounds travel. In December 1988 the criminal court approved a treatment plan that permitted Nelson to move on-grounds from one activity to another, and to leave the grounds on supervised travel twice a month (but not to visit his home). In January 1988 the criminal court approved a treatment plan that gave Manos similar on-grounds privileges, and in September 1989 the court granted Manos's motion for supervised off-grounds travel (but he, too, was not to visit his home).

In May 1990 two persons confined at Elgin escaped while traveling on off-grounds passes. William Murphy, then the director at Elgin, concluded that security needed improvement. He canceled all off-grounds passes and curtailed unescorted movement within the grounds while the facility constructed a fence. Treatment plans duly filed with the criminal court described this change. Neither Nelson nor Manos complained to the state court—although other inmates did, and some of them obtained judicial relief. Instead, in December 1990 Nelson and Manos filed suit in federal court under 42 U.S.C. §1983, contending that the reduction of their privileges violated the due process clause because it was a response to a breach of security rather than an outgrowth of an individual evaluation. See *Youngberg v. Romeo*, 457 U.S. 307 (1982). Litigation is proper under §1983, rather than 28 U.S.C. §2254, because the scope of passes may be understood as a condition of confinement. See *Graham v. Broglin*, 922 F.2d 379 (7th Cir.

1991) (request for placement in a work release program may be adjudicated under §1983).

Plaintiffs believe that the due process clause forbids any decisions applicable across the board to all inmates. They sought injunctive relief and damages on behalf of a class of all persons confined at Elgin after acquittal by reason of insanity. The fence was completed in March 1991, but on-grounds unsupervised travel has not been fully restored; most inmates' movement is supervised. In March 1994 the district court dismissed the suit without prejudice to its renewal in state court, concluding that abstention is appropriate. 1994 U.S. Dist. LEXIS 2896.

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed. R. Civ. P. 23(c)(1). This case was active on the district court's docket for three years and four months, but despite two motions for class certification and full briefing by the parties the court never decided whether it could be maintained as a class action. The court did not give a reason for this inaction, and we do not perceive one. Prompt decision one way or the other is imperative not only so that the parties know whose interests are at issue but also so that representative plaintiffs with live claims may be substituted. For a properly certified class action survives the mootness of the original representative's claims, while an individual action must be dismissed in identical circumstances. Compare *Sosna v. Iowa*, 419 U.S. 393 (1975), with *Board of School Commissioners v. Jacobs*, 420 U.S. 128 (1975). Both plaintiffs have been released from confinement at Elgin—Manos in December 1990 and Nelson in April 1993. See *People v. Nelson*, 244 Ill. App. 3d 356, 614 N.E.2d 277 (1st Dist. 1993). The district court did not mention these releases, which moot plaintiffs' request for injunctive relief. Although each plaintiff is subject to recommitment for future misbehavior, that possibility was held insufficient to satisfy Article III in *Weinstein v. Bradford*, 423 U.S. 147 (1975), which concluded that release on parole moots a dispute about the procedures the state

uses to make parole decisions. See also *Murphy v. Hunt*, 455 U.S. 478 (1982). A decision on class certification could permit other inmates to carry on the quest for injunctive relief, *Parole Commission v. Geraghty*, 445 U.S. 388 (1980), but two considerations counsel against a remand. First, the small size of the putative class (fewer than 85 at all pertinent times) coupled with the fact that each inmate was entitled to (and several received) individual consideration in state court suggests that the conditions for class certification have not been met. Second, Nelson and Manos have a live dispute with the defendants about damages, and our resolution of this dispute shows that class certification would be imprudent.

The district court abstained under the principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* held that a federal court should abstain when the federal case depends on the resolution of unsettled questions of state law within the competence of an administrative agency—in *Burford* itself, an agency regulating the oil industry. Plaintiffs observe that directives affecting passes from a single state mental facility are some distance from a statewide program of oil and gas regulation, and they add that nothing in this case depends on the resolution of an unsettled question of state law. The district court conceded all this but thought *Burford* applicable because the rules governing the treatment of mentally ill persons are important to the state. Although Illinois does not handle these matters through an agency with statewide power, or even a court of specialized jurisdiction, the district judge thought that the criminal court supervising each person's custody specializes in the details of that case: "While the Illinois circuit courts can hardly be said to [be] courts of technical specialization, in this instance they are courts of individual specialization."

Plaintiffs see this as proof that *Burford* cannot apply. No agency, no *Burford* abstention. This oversimplifies matters. Five years ago the Court recapitulated the *Burford* doctrine:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. New Orleans, 491 U.S. 350, 361 (1989) (*NOPSI*) (citations omitted). This language suggests that *Burford* is limited as plaintiffs propose. Yet two years ago the Court suggested that the *Burford* doctrine might justify abstention in a domestic relations case otherwise within the diversity jurisdiction, when a state court is available to resolve difficult questions of state law. *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992). If *Burford* abstention might be apt in a domestic-relations dispute, an agency's role cannot be essential.

Still, it is hard to fit this dispute within *Burford*. Its outcome does not depend on the answer to some unsettled issue of state law. And far from using a single agency or specialized court to "establish a coherent policy with respect to a matter of substantial public concern", Illinois has divided responsibility among the many criminal courts throughout the state. A decade ago, when a state judge issued an injunction governing the handling of escape risks at mental institutions, the Supreme Court of Illinois reversed on the ground that each judge supervising a person in custody after an insanity acquittal is entitled to consider the subject independently. *People v. Roush*, 101 Ill. 2d 355, 462 N.E.2d 468 (1984). *Roush* establishes that Illinois does not seek a uniform policy toward all persons situated similarly to plaintiffs, which makes the *Burford* doctrine inapplicable.

In the district court defendants relied not only on *Burford* but also on *Younger v. Harris*, 401 U.S. 37 (1971). The district court thought *Younger* irrelevant "because plaintiffs do not seek to enjoin any state court proceeding. It is true plaintiffs seek injunctive relief, but against Illinois' Department of Mental Health, not the Illinois courts." Yet *Younger* itself concerned a request for injunctive relief against the adverse litigant, not against a court or judge. The principle of *Younger* is that a party to a state proceeding affecting important governmental interests must resolve the dispute in the state's preferred tribunal. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). A federal court that simply ignores the pending state case, and resolves the question independently, damages the state interest a little less than a court that enjoins the pending state proceeding to boot, but in either case the principal objection is to the transfer of adjudication from the original state forum to the federal forum. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (treating an injunction against execution of a money judgment rendered by a state court as no better than an injunction against the continuation of the state proceedings).

Illinois requires the criminal court to supervise the confinement of persons found not guilty by reason of insanity. Both Nelson and Manos were active litigants in state court. As we have recounted, Nelson was especially active; he sought and obtained an order releasing him from confinement altogether in 1993. Every 60 days the staff of Elgin filed a new treatment plan with the court for each plaintiff. These plans recounted the limitations on passes. Either plaintiff could have opposed the implementation of the new plan on constitutional grounds—or on the ground that the change in the pass policy violated the orders approving earlier treatment plans and thus constituted contempt of court. No one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised in this litigation. The

cases pending in the courts of Illinois are continuations of the original criminal prosecutions, and preserving a state's right to litigate criminal cases in its own courts is the core of the *Younger* doctrine. Instead of presenting objections to the treatment plans, plaintiffs filed an independent suit in federal court. Their briefs imply that they made this choice because they were dissatisfied with the relief that state courts had afforded to other inmates at Elgin. But the limited relief may reflect not any restrictions on the state tribunal's power, or any unwillingness to entertain constitutional claims, but the shakiness of plaintiffs' arguments on the merits. We do not share plaintiffs' apparent view that dissatisfaction with state courts' handling of an issue justifies carting one's claim off to federal court.

There are exceptions to the *Younger* principle, but plaintiffs do not contend that any is applicable; they rest with the district court's conclusion that by not seeking an explicit injunction against the state court's role they have avoided *Younger*, and that conclusion is incorrect. Plaintiffs' litigation strategy creates another potential argument. Because they have been released, plaintiffs are not *now* litigants in active criminal proceedings; the staff at Elgin does not file new treatment plans, and there is no state forum in which plaintiffs may litigate their defenses to the details of these plans. But the Supreme Court long ago held that parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975).

"Federal post-trial intervention, in a fashion designed to annul the result of a state trial, . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction." *Id.* at 609 (footnote omitted). See also *NOPSI*, 491 U.S. at 369. What *Huffman* decried is, however, exactly what plaintiffs want. Treatment plans to which they made no objection in the state tribunals supervising their

treatment were put into effect; then plaintiffs sought to annul this result in federal litigation. *Younger* bars such a step.

Heck v. Humphrey, 114 S. Ct. 2364 (1994), holds that a prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or sentence has been reversed—a step that for state prisoners entails exhaustion of state remedies under 28 U.S.C. §2254. *Younger* supports a complementary holding for conditions of confinement that are actively supervised by state courts. This is not at all to create an exhaustion requirement for conditions-of-confinement litigation under §1983. *Felder v. Casey*, 487 U.S. 131, 147-48 (1988), and *Patsy v. Board of Regents*, 457 U.S. 496 (1982), hold that there is none. But it is to say that an inmate already participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent §1983 suit. Actually these plaintiffs are attempting state-defense removal too, arguing that the revocation of the passes violated the courts' earlier orders approving treatment plans that provided for passes. Violation of a state court's order is contempt of court, not a violation of the Constitution. *Pacelli v. deVito*, 972 F.2d 871, 876 (7th Cir. 1992). By stressing the tension between defendants' directives and the orders of the state courts, plaintiffs make pellucid the fact that their arguments should have been presented to the state courts.

We know from *Deakins v. Monahan*, 484 U.S. 193 (1988), that when *Younger* requires equitable arguments to be presented to state courts, claims for monetary relief also are stayed—but should not be dismissed outright if the claims for damages cannot be redressed in the state proceeding. Plaintiffs have not argued, however, that their claims for money damages lie outside the competence of the state courts that supervised their confinement. Illinois does not maintain a separate system of criminal courts; criminal cases (and subsequent disputes about confinement and treatment) are heard by judges of the circuit courts, which possess general jurisdiction. If a single wrong leads

to both equitable relief and damages, judges of the circuit courts are empowered to provide both remedies. The judge not only could have ordered the restoration of passes but also could have made a monetary award for the period between their revocation on May 30, 1990, and the date of their restoration. Because the state courts were empowered to award both equitable and monetary relief, *Younger* obliged plaintiffs to make all of their arguments there. Any other approach would tolerate exactly the sort of end run that *Huffman* forbids.

Younger is hardly the only doctrine designed to protect state forums. Res judicata (claim preclusion) and collateral estoppel (issue preclusion) are fully applicable under §1983, *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), and may have undercut plaintiffs' claims. They had an opportunity to litigate, and their failure to oppose approval of the treatment plans does not avoid the fact that they *were* approved. *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 704-05 (7th Cir. 1987) (Illinois law). Preclusion is, however, an affirmative defense, which the defendants did not invoke. See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317 (1977). Nelson and Manos might have been able to avoid issue preclusion because their very quiescence in the state proceedings meant that the approval was uncontested, and issue preclusion rests on the disposition of a contested element of the claim. Then there is the *Rooker-Feldman* doctrine, which establishes that aggrieved litigants may not use §1983 to contest the outcome of state litigation. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Plaintiffs avoid this rule, however, because they challenge the alteration of their passes independently of the courts' approval of that alteration. *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993). *Younger* and *Huffman* complete the picture. Even when res judicata, *Rooker-Feldman*, and the exhaustion doctrine of §2254 are inapplicable, a litigant opposing the state, in state court, on a subject of importance

to the state, must use that forum for resolution of constitutional defenses. Plaintiffs had, and did not use, a state forum in which they could have presented the arguments they now urge. Their deliberate bypass of the opportunity to litigate in state court forecloses them from litigating in federal court. Our conclusion that *Younger* rather than *Burford* supplies the proper ground of decision does not affect the district court's judgment: the complaint must be dismissed.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

This is in some respects a puzzling case, but I believe we must start with first principles. It is a grave matter to shut the federal courthouse doors in the face of litigants who present claims over which there is federal jurisdiction. Abstention is "an extraordinary and narrow exception" permissible only in "rare" cases and then only on grounds clearly recognized as adequate by the Supreme Court. *Allegheny County v. Masheda*, 360 U.S. 185, 188 (1959); *see also Trust & Investment Advisors, Inc. v. Hogsett*, No. 93-2117, slip op. at 7 (7th Cir. Dec. 19, 1994).

In the matter before us I think that the district court made bad law out of what may be a hard case. The majority, in an effort to devise a policy for what is at least an unusual case, makes equally bad law. It would require a stretch far beyond any recognized principles to see this as a case for *Burford* abstention and the majority correctly addresses this issue. But, in so doing, it provides an expansive interpretation of *Younger* which would authorize closing the courthouse doors almost at will.

There are several reasons why *Younger* has no application here. First, this is not a case of a federal court

attempting to enjoin a state proceeding. *See Trust & Investment Advisors, Inc.*, slip op. at 8 (*Younger* abstention involves enjoining "judicial or judicial in nature" state proceedings). Here there are at worst potentially parallel proceedings and there is no showing that the federal proceedings will, "damage [ ] the state interest" as the majority suggests.

Second, there are no ongoing or pending state proceedings to be interfered with here. Under Illinois law, the Department of Mental Health (Department) is required to file a treatment plan for each NGRI inmate with the state court every 60 days. That plan, if the Department so chooses, can recommend that an inmate be given on- or off-grounds passes. If the court approves the treatment plan, then the Department may allow the inmates to use their passes. Both plaintiffs in this case had passes originally, but after two inmates escaped from Elgin, those passes were summarily taken away by the Department without any individual review administratively or by the state courts. Passes were also taken away from the other NGRI's. After a security fence was built, some NGRI's were again given passes, but the passes now only allowed movement in the very small area within the fence, and only for a short time.

The majority implies that the plaintiffs have litigated this issue and others relating to their confinement in state court, with plaintiff Manos being so active that he eventually obtained his release. But the Magistrate Judge's findings of fact say that it was the *Department* which submitted a plan that "restored" the new passes to the plaintiffs and which suggested the release of plaintiff Manos. In other words, the plaintiffs were not actively litigating this issue; rather the *status quo* of the Department's suggesting treatment plans and the court's approving them simply continued. The Department decided what to suggest as treatment, and it was the Department which decided to remove passes without individual review, the Department which decided that when it reintroduced passes they would be much more restrictive and the Department

which decided not to suggest any more less-restrictive passes. The plaintiffs are challenging the Department's decision to do away with their court-approved (and less-restrictive) passes, not a decision by the state courts. Their reason for going to federal court may simply reflect a concern that the state courts may too routinely approve the recommendations of Department employees.

It is true that the state courts retain jurisdiction of the inmates at Elgin and must reapprove treatment plans every 60 days. The Department retains some discretion in implementing the plans. It is also true that the Department may not be able to exercise its discretion should the court *order* it to provide all the privileges approved in the plan. But the fact that there may be a state remedy in existence but not invoked is certainly not grounds for *Younger* or any other species of abstention. Not infrequently, federal and state courts may have *jurisdiction* to address similar problems but, unless federal measures disrupt ongoing state proceedings, there are generally no grounds for abstention.

Abstention is for the rare case, and this case surely fits into the federal §1983 jurisprudence. We have also decided similar cases brought by Elgin inmates in this court in the past, and saw no reason to abstain then. For example, in *Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983), individuals found "unfit to stand trial" (USTs) brought a §1983 claim against the Department of Mental Health for its practice of assigning all USTs to a more secure facility, for its failure to allow access to telephones and for unduly restricting the movements of inmates around the facility. In *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992), an Elgin inmate who had been transferred to the more secure Chester Mental Health Center brought a §1983 claim against the Department of Mental Health, saying that the transfer and visitation restrictions imposed by the Department violated his right to due process. In both of these cases, the plaintiffs' confinement was governed by a statute which required approval of UST treatment plans by the state court, just like the statute at

issue here governing NGRIs. Thus the plaintiffs in *Johnson* and *Maust* presumably had the same "ongoing relationship" with the state courts that plaintiffs here do. Yet in both these cases we reached the merits with no talk of abstention or *Younger*.

I do not therefore agree that *Younger* abstention applies, and I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—1-4-95

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-1764

WAYNE NELSON and ANTHONY MANOS,

Plaintiffs-Appellants,

v.

WILLIAM MURPHY, Acting Director of the Department of Mental Health and Developmental Disabilities, *et al.*,

Defendants-Appellees.

On Petition for Rehearing

DECIDED MARCH 13, 1995

Before CUDAHY, ESCHBACH, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* One of the arguments in the petition for rehearing leads us to elaborate on our initial opinion. *Younger v. Harris*, 401 U.S. 37 (1971), applies to plaintiffs' claim for damages only if the state forum could have entertained a request for damages. We wrote that, in Illinois, "[i]f a single wrong leads to both equitable relief and damages, judges of the circuit courts are empowered to provide both remedies. The judge not only could have ordered the restoration of passes but also could have made a monetary award for the period between their revocation on May 30, 1990, and the date of their restoration." Slip op. 8-9. Plaintiffs insist that this is incorrect—that only the state's Court of Claims may

award damages. If that is so, then *Deakins v. Monahan*, 484 U.S. 193 (1988), entitles plaintiffs to pursue damages in federal court free from any inhibition of the *Younger* doctrine.

The petition for rehearing asserts that "damage claims against the State of Illinois and its employees can only be maintained in the Illinois Court of Claims." The assertion is wrong. That court possesses exclusive jurisdiction of all claims against the state itself, 705 ILCS 505/8, but not of claims against state employees. Illinois deems some suits against employees to *be* suits against the state, and therefore to come within the Court of Claims' exclusive jurisdiction, but the Supreme Court of Illinois makes the same distinction as the Supreme Court of the United States did in *Ex parte Young*, 209 U.S. 123 (1908), and *Kentucky v. Graham*, 473 U.S. 159, 169-70 (1985): suits against a public employee in his official capacity are suits against the state; suits against the employee in his personal capacity are not suits against the state; and a suit seeking damages for misconduct (in particular, for a violation of the Constitution) usually is a personal-capacity suit. The circuit courts, rather than the Court of Claims, possess jurisdiction "when it is alleged that the State's agent acted in violation of statutory or constitutional law, or in excess of his authority". *Healy v. Vaupel*, 133 Ill. 2d 295, 308, 549 N.E.2d 1240, 1247 (1990). See also, e.g., *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 188, 470 N.E.2d 1029, 1038-39 (1984). Plaintiffs allege that their jailers acted in violation of the Constitution of the United States and the laws of Illinois. The circuit court therefore could have awarded damages, if plaintiffs were entitled to that relief on the merits. But plaintiffs never presented their arguments to the state tribunals, and as our original opinion explains they may not disdain opportunities in ongoing state litigation and later seek relief in federal court.

The petition for rehearing is denied. No judge in active service has called for a vote on the suggestion of rehearing en banc, which is rejected.

CUDAHY, *Circuit Judge*, Dissenting.

I dissented in the main case, *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995), from the remarkable conclusion that *Younger* abstention could apply when there was no federal attempt to enjoin a state proceeding, and, in fact, where there was no ongoing or pending state proceeding with which to interfere. There are more fundamental reasons to reject the majority's view here than whether these damage claims may be brought exclusively in the Court of Claims. Therefore, with the utmost respect, I dissent from the present opinion and order and would grant the petition for rehearing.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—3-13-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAYNE NELSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 90 C 3920
	)	
WILLIAM MURPHY, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

BACKGROUND

Plaintiffs Anthony Manos and Wayne Nelson were both charged with crimes under Illinois law but found not guilty by reason of insanity. Pursuant to Illinois' Criminal Code, Ill. Rev. Stat. ch. 38, para. 1005-2-4, plaintiffs were separately admitted to the Elgin Mental Health Center, a state-run facility, as forensic patients. Under the terms of § 1005-2-4 the director of the Elgin

Center, a defendant in this case, is required to submit a treatment plan to the court for each forensic patient every sixty days, evaluating the patient's progress and the extent to which they are benefitting from treatment. The treatment plan may also include privileges to move about the grounds of the facility unsupervised, or leave the facility with or without supervision for limited periods of time, provided they have been approved by specific court order. In issuing such an order, the supervising court is entitled to impose such conditions as are deemed necessary to assure the patient's satisfactory progress in treatment, and the safety of the patient and others. Ill. Rev. Stat. ch. 38, para. 1005-2-

4(b). Forensic patients at Elgin Mental Health Center received passes for on or off-grounds privileges only after a thorough, multi-tiered assessment of their propriety in each individual case.

Prior to May 1990, plaintiffs, along with other forensic patients at the facility, had been granted such passes. On May 30, 1990, after two patients escaped through the use of off-grounds passes, all passes of forensic patients at the center were summarily suspended. Plaintiffs have never received another individualized review to determine whether they were still appropriate candidates for passes. Subsequently, the center has issued on-grounds passes which allow forensic patients to move within a fenced-in

space of the facility under supervision, allowing unsupervised movement only for extremely limited periods of time.

Plaintiffs have filed suit against defendants, the director and associate director of the Illinois Department of Mental Health, and the director of the Elgin Mental Health Center, alleging the suspension of their passes, without any subsequent hearing to determine the appropriateness of the suspension, violates their rights under the Due Process Clause. Plaintiffs have asked for monetary and injunctive relief.

PROCEDURAL HISTORY

This case was initially assigned to Judge Bua. At its inception, plaintiffs moved for certification of a class of

all individuals admitted to Elgin Mental Health Center pursuant to § 1005-2-4 in possession of on or off-grounds passes which were revoked on or about May 31, 1990. Plaintiff's motion for class certification is still pending before the court. Plaintiffs had also moved for a preliminary injunction restoring all passes suspended at the end of May 30, 1990, and prohibiting future suspensions of passes for periods of greater than 72 hours without a judicial hearing. In their response to plaintiffs' motion, defendants raised the question of whether abstention was appropriate in this case under either *Younger v. Harris*, 401 U.S. 37 (1971), or *Burford v. Sun Oil*, 319 U.S. 315 (1943). Judge Bua referred those

portions of the motion addressing the factual basis for a preliminary injunction to Magistrate Judge Pallmeyer.

The magistrate judge held an evidentiary hearing and issued a report and recommendation concluding that plaintiffs were entitled to a preliminary injunction. A search of the official case record reveals that the abstention question has yet to be resolved. Pragmatism dictates the court address it now.

ANALYSIS

Lack of subject-matter jurisdiction is never waivable. *U.S. v. Stillwell*, 900 F.2d 1104, 1110 (7th Cir. 1990); *cert. denied*, 498 U.S. 838 (1990). The court may examine the question of its

jurisdiction and dismiss an action, be it via the suggestion of the parties or otherwise, at any time. Fed. R. Civ. P. 12(h)(3).[1] Consideration of defendants' motion to abstain from the exercise of jurisdiction is therefore appropriate despite the passage of time since the filing of this case, and its progress on the merits. Further, it is more than appropriate, it is necessary. A judge has no power to decide a case over which he lacks subject-matter jurisdiction. *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 814 (1992).

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[1] In any event, it can not be argued that defendants waived this issue by failing to base an objection to the report and recommendation on this ground, because the issue of abstention was never before the magistrate judge for consideration.

The federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976). Abstention from the exercise of such jurisdiction is the exception, not the rule. *Id.*, at 813. Defendants nevertheless suggest that two of the four permissible forms of abstention are appropriate here. First, defendants suggest that the court should refrain from the exercise of jurisdiction under *Younger* abstention, which indicates a federal court should abstain from exercising its jurisdiction when it has been invoked to restrain a state criminal proceeding. Although *Younger* abstention may be applied to suits to

enjoin state civil proceedings if the state's interest in the proceeding is important enough to implicate federal-state comity, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975), it is inapplicable here because plaintiffs do not seek to enjoin any state court proceeding. It is true plaintiffs seek injunctive relief, but against Illinois' Department of Mental Health, not the Illinois courts.

Defendant's second assertion, that *Burford* abstention applies, presents an altogether more serious basis for declining jurisdiction. *Burford* abstention is appropriate either where the court is presented with difficult questions of state law bearing on policy

problems of substantial import whose importance transcends the result in the case at bar, or where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Colorado River*. 424 U.S. at 814. This case presents a claim for the second type of *Burford* abstention.

The burden of the circumstances requiring *Burford* abstention lies with the proponent of abstention. *Property & Casualty Insurance Limited v. Central National Insurance Company of Omaha*, 936 F.2d 319, 326 (7th Cir. 1991). The presence of federal question jurisdiction may raise the level of

justification needed for abstention, *Colorado River*, 424 U.S. at 815, n. 21, but it does not preclude abstention. *See also* *New Orleans Public Services, Inc. v. Council of City of New Orleans* *("NOPSI")*, 109 S. Ct. 2506, 2516 (1989) (mere assertion of a federal constitutional challenge along will not compel exercise of jurisdiction). Indeed, one of the bases for jurisdiction in *Burford* was a claim under the Due Process Clause of the Fourteenth Amendment. *Burford*, 319 U.S. at 317.

In *NOPSI*, a suit over an electric utility's decision to participate in a nuclear power plant venture, no state law claims existed or were implicated in the suit. Nevertheless, the Supreme

Court upheld the decision of the Fifth Circuit that this was not fatal to *Burford* abstention, which could be based on reluctance to intrude into a complex regulatory scheme of paramount local concern which demands local expertise. *NOPSI*, 109 S. Ct. at 2514. Instead, the court declined to exercise *Burford* abstention on the basis that taking jurisdiction would not disrupt state efforts at uniform treatment of a local problem because a bare facial inquiry indicated that federal preemption applied. *Id.*, at 2515. These circumstances are not applicable here.

Factors to be considered in determining whether to apply *Burford* abstention include 1) whether the suit is based on a cause of action which is

exclusively federal, 2) whether difficult or unusual state laws are at issue, 3) whether there is a need for coherent state doctrine in the area, and 4) whether state procedures indicate a desire to create special state fora to adjudicate the issues presented. *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 709 (7th Cir. 1991). The last of these factors has more recently been elevated to the level of a prerequisite for abstention. That is, the state must provide a forum which stands in a special relationship to technical oversight or concentrated review to evaluation of the claims at issue. *Property & Casualty Insurance*, 936 F.2d at 323.

The court finds that defendants have met this prerequisite. A circuit court judge maintains jurisdiction over a patient he or she commits to a mental institution pursuant to § 1005-2-4. *People v. Roush*, 101 Ill.2d 355, 462 N.E.2d 468, 472 (1984). This jurisdiction continues even after the expiration of a term of a conditional release, Ill. Rev. Stat. ch. 38, para. 1005-2-4-(h). *People v. Butler*, 194 Ill. App.3d 297, 550 N.E.2d 1250, 1253 (1 Dist. 1990). Further, the clear intent behind the provision of §§ 1005-2-4(b)&(h), requiring submission of regular treatment plans to the court and providing for orders of conditional release, was to enable the circuit court judge to monitor the progress in

treatment of defendants committed under this section, and to give the court authority to direct the Department of Mental Health in performing its duties in this regard. *People v. Valdez*, 79 Ill.2d 74, 402 N.E.2d 187, 193 (1980). While the Illinois circuit courts can hardly be said to courts of technical specialization, in this instance they are courts of individual specialization. The system of judicial oversight erected by § 1005-2-4 provides that treatment and commitment decision for a defendant under the section are reviewed by judges intimately and continuously involved with the facts of that particular case. This is sufficient to constitute the kind of technical oversight contemplated by the *Property & Casualty Insurance*

court.

Turning to the other factors employed in deciding questions of *Burford* abstention, the state and federal courts have concurrent jurisdiction over plaintiffs' due process claim.[2] On the other hand, Illinois law on the commitment of defendant found not guilty by reason of insanity is neither difficult nor unusual, although as discussed supra, *NOPSI* shows that this is not particularly crucial. Hence, application of *Burford* abstention turns on the existence of Illinois need for coherent doctrine in the area of the

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[2] Rather than being merely a factor in deciding whether to apply *Burford* abstention, the existence of concurrent jurisdiction should be a prerequisite as well.

treatment of § 1005-2-4 defendants.

When inquiring into the substantiality of a state's interest in its proceedings, the court does not dwell on the state's interest in the outcome of a particular case, but on the importance of the generic proceedings to the state. *NOPSI*, 109 S. Ct. at 2516. In this case, the state of Illinois' purposes in enacting § 1005-2-4 were to protect society from potentially dangerous mentally ill persons and protect these persons from themselves, to treat them for their illness, and to prevent them from being institutionalized indeterminately. *People v. Winston*, 191 Ill. App.3d 948, 548 N.E.2d 406, 414 (1 Dist. 1989), *disapproved on other grounds People v.*

Palmer, 148 Ill.2d 70, 592 N.E.2d 940 (1992); *People v. Williams*, 140 Ill. App.3d 216, 488 N.E.2d 649, 653 (1 Dist. 1986); *People v. Larson*, 132 Ill. App.3d 594, 478 N.E.2d 439, 444 (1 Dist. 1985), *disapproved on other grounds* *People v. Palmer*, 148 Ill.2d 70, 592 N.E.2d 940 (1992); *People v. Hampton*, 121 Ill. App.3d 273, 459 N.E.2d 985, 987 (1 Dist. 1983). These are certainly interests of substantial importance. Further the state has created a system of supervision of § 1005-2-4 defendants which prohibits major changes in a defendant's treatment plan or status without individual review by a judge already familiar with the history of that defendant.

In *Roush*, the Illinois Supreme

Court reviewed two lower court decisions concerning the same problem presented here, the escape of § 1005-2-4 defendants. *See also* People v. Schyve, 112 Ill. App.3d 777, 445 N.E.2d 1261 (1 Dist. 1983). In particular, the facts in the *Roush* case involved an inmate at the Manteno Mental Health Center who escaped while out on an unsupervised on-grounds pass with his parents. The circuit court judge in *Schyve* issued orders requiring the Department of Mental Health to identify all § 1005-2-4 defendants who were dangerous to others, segregate them in a secure area, and given ten days notice to the court before transferring any of them to a less secure area. The Supreme Court held that since the orders were directed

at all patients in Illinois, most of whom had never appeared before the judge and were committed to institutions by other judges, they were invalid. *Roush* case indicates that by seeking generalized injunctive relief in federal court, the very kind of relief *Roush* prohibits, plaintiffs lawsuit disrupts Illinois' efforts to establish a coherent policy in the treatment of § 1005-2-4 defendants.

This result appears to be counterintuitive at first glance, because a general injunction would produce uniform results for all § 1005-2-4 defendants. However in this case, general orders of relief are antithetical to a state system based on individualized review of each patient by

a particular judge.[3] The members of the purported plaintiff class, who are provided counsel by the statute, Ill. Rev. Stat. ch. 38, para. § 1005-2-4, may receive the injunctive relief they seek before the circuit judge who committed them to the Elgin Mental Health Center, with or without raising their due process claim.

Plaintiffs' only rejoinder to this conclusion, raised indirectly in their reply brief to the motion for class certification, is that presentation of the factual issues involved before the appropriate circuit court judge would be

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[3]The irony, of course, is that the gravamen of plaintiffs' due process claim is the alleged lack of such individualized review in defendants' decisions to suspend on and off-grounds passes.

futile because the Department of Mental Health has already indicated they will not comply with any court order reinstating on or off-grounds passes. Plaintiffs only evidence of this allegation is a memorandum from defendant Brelje stating the Department of Mental Health's grounds for the suspension of passes, and opining that issuing unsupervised passes would not be a good idea until a security fence is constructed. This is hardly sufficient evidence that defendants will refuse to comply with an order from the circuit court. Further, the law is clear that defendants cannot do so. *Valdez*, 402 N.E.2d at 193. If they do so wilfully, they may be found in criminal contempt of court. *Roush*, 462 N.E.2d at 472.

Plaintiffs' support for their assertions that they have not waived the opportunity to raise the issues of passes before the state court, or that forensic patients holding passes have not been allowed to use them, is equally unimpressive. Plaintiff Nelson also asserts in an affidavit that he has never waived an opportunity to get back his on or off-grounds passes or told anyone he did not want his passes back. However, affidavit also states that plaintiff declined to participate in a hearing about his passes. Further, the affidavit of Mr. Nelson's attorney at the hearing does not state that the issue of passes has been raised.

The only support for the argument that patients, specifically one Curtis

Littrice, have not been able to use their passes is a statement in Mr. Nelson's affidavit that he has never seen Mr. Littrice leaving the building in which they are both housed. Unless Mr. Nelson spends his days with his face pressed to the window this does not create a particularly strong inference. The absence of an affidavit from Mr. Littrice himself is notable.

CONCLUSION

The court finds that the exercise of its jurisdiction over this case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. Accordingly, the court abstains from the exercise of jurisdiction. Plaintiffs' complaint is

dismissed without prejudice.[4] Plaintiffs' motions for class certification and for a preliminary injunction are denied as moot.

ENTER:

JOHN A. NORDBERG
United States District Judge

DATED: _____

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[4] The court does not retain jurisdiction over the case, and the parties must look to the state courts to resolve this dispute. Gordon G. Young Federal Court Abstention and State Administrative Law From *Burford to* Ankenbrandt: Fifty Years of Judicial Federalism Under *Burford v. Sun Oil Co.* and Kindred Doctrines, 42 DePaul L. Rev. 859, 870-71 (1993). The only further federal court involvement would be certiorari from the state court proceedings to the Supreme Court. *Id,* at 871, n. 58.

NO. 90 C 3920
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
WILLIAM MURPHY, Acting Director, Department of Mental Health and Developmental Disabilities; and ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, PH.D., Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,	)
Defendants.	)

REPORT AND RECOMMENDATION

In May 1990, Plaintiffs Wayne Nelson and Anthony Manos were "forensic patients" at the Elgin Mental Health Center, a state-run mental health facility. Forensic patients are persons

charged with or convicted of a crime who have been committed to the care of the state because of a judicial determination that they are not fit to stand trial or not guilty by reason of insanity. Despite this status, prior to May 1990, Nelson and Manos, as well as other forensic patients, were granted court-approved passes to walk without supervision for limited periods on the grounds of the Elgin facility ("grounds passes") and to travel with others for limited periods away from the facility ("off -grounds passes"). On May 30, 1990, state officials abruptly suspended the passes for all forensic patients. Nelson and Manos bring this action on behalf of themselves and similarly situated forensic patients against

directors of the Illinois Department of Mental Health and Developmental Disabilities (hereinafter, "DMHDD" or "the Department"), challenging the department's decision to suspend passes as a deprivation of liberty without due process.[5]

Plaintiffs' complaint, brought pursuant to 42 U.S.C. § 1983 ("Section 1983") sounds in three counts. Count I alleges a deprivation of Plaintiffs'

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[5] Plaintiffs seek to represent a class of forensic patients who enjoyed grounds passes and off-grounds passes prior to May 31, 1990, but the class has not been certified, nor has the class certification motion been briefed. Moreover, the motion for class certification has not been referred. Therefore this report addresses only individual Plaintiffs' claims for relief, but recognizes that much of what is concluded here may well be applicable to circumstances involving other forensic patients.

statutory right to treatment in the "lease restrictive environment" as a result of Defendants' failure to provide Plaintiffs with a hearing individualized determination, or professional judgment regarding whether they continued to qualify for a grounds pass or an off-grounds pass prior to the suspension of their pass privileges. Count II asserts that Plaintiffs were deprived of their statutory right to adequate and humane services pursuant to an individualized treatment plan when Defendants failed to provide them with an individualized determination based upon professional judgment that they no longer qualified for the passes. Count III alleges a deprivation of Plaintiffs' constitutional right to freedom from

unreasonable restraint resulting from Defendants' decision to suspend the pass privileges without exercise of a qualified professional judgment.

On November 15, 1990, District Judge Nicholas J. Bua referred the case to Magistrate Judge Joan B. Gottschall for a report and recommendation on Plaintiffs' motion for preliminary injunction.[6] In January 1991, Plaintiffs moved to compel responses to

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[6] In his minute order dated November 15, 1990, Judge Bua directed that the parties present evidence at a hearing before the magistrate judge on a number of specific issues, including the procedures for obtaining or for revoking a grounds or off-grounds pass; whether any passes had been reinstated; and the extent to which Elgin residents are permitted on the grounds without passes. The court expressly reserved ruling on Plaintiffs' motion for class certification pending the magistrate judge's report and recommendation on the preliminary injunction motion.

EDITOR'S NOTE

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discovery requests. On October 10, 1991, the referral was transferred to these chambers. Defendants did not comply fully with outstanding discovery until directed to do so by this court in January 1992. Parties presented evidence on Plaintiffs' motion for preliminary injunction on June 3 and 4, 1992, and submitted post-hearing memoranda on June 22, 1992.

Before the court is Plaintiffs' motion for a preliminary injunction requesting that this court issue an order which restores to Plaintiffs all passes suspended on May 30, 1990 and enjoins defendants from suspending such passes in the future in the absence of a predeprivation hearing which complies with due process.

FINDINGS OF FACT

Evidence presented at a two-day hearing in June 1992 supports the following findings:

1. Elgin Mental Health Center ("Elgin") is a facility of the Illinois DMHDD that houses approximately 300 forensic residents. The forensic unit at Elgin is composed of individuals found not guilty by reason of insanity ("NGRI") and/or unfit to stand trial ("UST").

2. At all relevant times, Defendant William Murphy was the Director of the Illinois DMHDD. Defendant Terry Brelje was the Associate Director for Policy and Special Programs of the DMHDD. Defendant Roalda Alderman was the Facility Director at Elgin.

3. At all times relevant to this motion, named Plaintiffs Wayne Nelson and Anthony Manos were confined to Elgin as unfit to stand trial or as not guilty by reason of insanity. Under Ill. Rev. Stat. ch. 38 ¶ 104-17, a defendant unfit to stand trial by reason of mental disability "shall be placed in a secure setting" in the custody of DMHDD. Under Ill. Rev. Stat. ch. 38 ¶ 1005-2-4, a defendant found not guilty by reason of insanity and in need of mental health services likewise "shall be placed in a secure setting" in the custody of DMHDD. Manos was committed as UST from January 1986 and as NGRI from October 1986. Nelson was committed as NGRI in October 1986. Both Nelson and Manos were placed in the forensic unit at Elgin.

4. Illinois law requires that the DMHDD file a treatment plan for each forensic patient every 60 days with the court. Ill. Rev. State. ch 38, ¶ 1005-2-4(b). The statute provides expressly that the plan may include pass privileges, "but only where such privileges have been approved by specific court order, which order may include such conditions on the defendant as the Court may deem appropriate and necessary to reasonably assure . . . progress in treatment and the safety of the defendant and others." *Id.*

5. Ernest Marquez, the Assistant Facility Director responsible for administering the forensic treatment program at Elgin, described the following DMHDD procedures for

requesting a court-authorized grounds pas or off grounds pass for a forensic patient. First the patient's treatment team (consisting of the patient's unit director, a psychiatrist, psychologist, social worker, and other nursing or paraprofessional staff) reviews records and considers the appropriateness of pass privileges for a particular patient in light of the team's knowledge of, and experience with, that patient. If the team determines that a pass is appropriate, then a staff member prepares a packet of information for review by Dr. Marquez. If Dr. Marquez approves the request for a pass, he in turn submits the package to Defendant Roalda Alderman, the Facility Director. Following her review, the materials are

submitted to the Department's Associate Director, Defendant Brelje. Upon Dr. Brelje's approval, the packet of materials is returned to the facility, where, under Ms. Alderman's direction, the materials are used for preparation of a court petition. A judge of the Circuit Court must review and approve the petition before a pass is issued for any forensic patient.

6. Plaintiff Anthony Manos, a graduate of the University of Illinois who served in Army ROTC, was admitted to Elgin as unfit to stand trial in January 1986. Six months later, Mr. Manos was found not guilty by reason of insanity and returned to Elgin in October 1986. In January 1988, following the procedures described above, Defendant

Alderman submitted a petition to the Circuit Court of Cook County seeking approval of a grounds pass for Plaintiff Manos. In February 1988, the Circuit Court issued an order granting Manos a grounds pass. Manos used this pass to be on the grounds of Elgin unaccompanied for gradually increasing periods of time. His longest periods spanned up to three hours, during which he went to the commissary or the workshop, or engaged in various educational, social and recreational activities. Manos testified that his pass helped him to maintain and establish family relationships. Specifically, he used his grounds pass to visit weekly with his parents in a cafeteria at Elgin. Further, while exercising his pass

privileges in 1988, Manos met Linda Turner, a non-forensic patient, whom Manos plans to marry in 1993. At the preliminary injunction hearing, Manos recalled crying with joy when he first received his pass. He testified to his "good memories" of "many, many times on the grounds" at Elgin exercising pass privileges.

7. In March 1990, Defendant Alderman petitioned the Circuit Court of Cook County for approval of an unsupervised off-grounds pass for Manos. As described earlier, the request was reviewed first by staff, then by Dr. Marquez, and finally by Dr. Brelje. The Circuit Court issued an order authorizing an off-grounds pass for Manos. This pass permitted Manos to be

off the grounds of Elgin once a week for periods of up to six or seven hours, provided that Manos gave Elgin staff a schedule in advance of is departure. Manos used his off-grounds pass approximately three times a month to visit family members and to go to movies, bowling alleys, and stores.

8. Wayne Nelson is a 1975 high school graduate who was honorably discharged from the United States Air Force in 1979. In 1980, Nelson killed his girlfriend and attempted suicide. Nelson was found not guilty of criminal charges against him by reason of insanity and was committed to the forensic unit at Elgin in 1986. In November 1988, following the procedures describe above, Defendant Alderman

proposed to the Circuit Court that Plaintiff Nelson be given both a grounds pass and supervised off-grounds pass. The Circuit Court issued an order granting Nelson the passes on December 20, 1988.

9. The grounds pass permitted Nelson to be on the grounds of Elgin unaccompanied for periods of up to one hour at a time and allowed Nelson to go to the commissary, library, and education center. The grounds pass also allowed Nelson to participate in other recreational and social activities such as walking, jogging, bike riding, guitar playing, and meeting with friends. Nelson utilized his off-grounds pass to visit family, go to movies, and attend social events at the

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10. Approximately 80 patients at Elgin had grounds or off-grounds passes on May 30, 1990. Each of these passes had been issued only after all of the procedures described above had been satisfied -- in other words, the Circuit Court issued each pass only after recommendations had been supplied by treatment staff. Dr. Marquez, Dr. Brelje, and Director Alderman.

11. In May 1990, two persons acquitted by reason of insanity escaped from Elgin during the exercise of their pass privileges. Although one was apprehended quickly, another remained at large and has not to date been apprehended. Only days before his escape, this second individual had

warned Elgin staff of his intention to leave. In spite of the warning, no action was taken to suspend this individual's pass privileges. The escapes generated a large amount of negative publicity for DMHDD. Within a couple of days of the escapes, Defendant Murphy met with other members of the DMHDD staff, including Defendant Brelje. Murphy concluded that staff determinations regarding pass privileges were not guided by any "set criteria," and that the forensic treatment program should now become a "separate freestanding program." Murphy decided to suspend all grounds and off grounds pass privileges for all forensic patients, effective May 30, 1990. Plaintiffs Nelson and Manos, and

approximately 80 other NGRI' or USTs, lost their pass privileges.

12. It is undisputed that prior to suspending the passes, state officials made no individualized determination that Nelson, Manos, or any of the other insanity acquittees were no longer appropriate candidates for the passes. In fact, state officials did not conduct a hearing of any kind to determine whether Plaintiffs remained qualified to exercise pass privileges. It is undisputed that no deterioration in either Manos' or Nelson's mental health condition had been observed prior to the suspension.

13. Subsequent to the suspension of passes, after years of effort, Defendant Alderman received funding

authorization for construction of a fence around the Elgin forensic unit in the summer of 1990. DMHDD completed construction of the fence which enclosed the Forensic Treatment at Elgin in March 1991. Beginning in March 1991, some members of the proposed Plaintiff class were issued new "grounds passes" which allowed them to be outdoors yet still within the enclosed area, an area approximately one-tenth the size of the 80-acre Elgin facility. Even within the fenced-in area, however, the movement permitted by these new passes is far more restrictive than that permitted under the passes suspended on May 30, 1990 ("old passes"). The new passes restrict Plaintiffs to the enclosed area and do not permit them to be

unsupervised even within the enclosed area for more than five minutes. Prior to the preliminary injunction hearing, even state officials themselves were unaware that patients have new grounds passes are not permitted to walk freely on fenced-in grounds. The restrictions which the new passes place on Plaintiffs' freedom of movement contrast starkly with the freedom Plaintiffs enjoyed under their old passes, under which Plaintiffs were free to roam the 80-acre Elgin campus without supervision. The only liberty now accorded to an inmate holding a new pass that is not accorded to an inmate without such a pass is that the pass holder may walk from one building to another, within the fenced-in area (a

five-minute walk), without escort.

14. Beginning in July 1990, staff at Elgin reviewed patient records for each of the forensic patients who had enjoyed pass privileges prior to May 1990. Defendants concluded that both Plaintiffs Nelson and Manos should have their passes restored once the fence was constructed. As of the date of the preliminary injunction hearing, no members of the proposed class enjoy the freedoms they exercised under the old passes.

15. In December 1990, the Elgin Mental Health Facility released Plaintiff Manos pursuant to a petition filed by Department personnel. At some time prior to the preliminary injunction hearing, staff at Elgin proposed that

Plaintiff Nelson also be conditionally released.

DISCUSSION

Standards for Preliminary Injunctive Relief

A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are:

1. whether plaintiff has a reasonable likelihood of success on the merits;

2. whether plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue;

3. whether the threatened injury to plaintiff outweighs the threatened harm the injunction may inflict on defendant;

4. whether the granting of the preliminary injunction will disserve the public interest.

Kellas v. Lane, 923 F.2d 492 (7th Cir. 1990); *Faheem-El v. Klincar*, 841 F.2d 712, 716 (7th Cir. 1988). The "likelihood of success" factor is a threshold inquiry; a finding against Plaintiffs will obviate the need for further analysis. *Adams v. Attorney Registration and Disciplinary Comm'n*, 801 F.2d 968, 971 (7th Cir. 1986) (quoting *O'Connor v. Board of Educ.*, 645 F.2d 578, 580 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981)). In this case, the central inquiry for determining Plaintiffs' likelihood of success is whether they have a liberty interest in the passes which were summarily revoked on May 30, 1990.

Plaintiffs argue that they have three protected liberty interests in the

passes. First, Plaintiffs contend that they have a liberty interest in receiving treatment in the "least restrictive environment." (Complaint, ¶ 27.) Second, Plaintiffs assert a liberty and/or property interest in "adequate and humane care and services pursuant to an individual services plan" (Complaint, ¶ 32.) Third, Plaintiffs argue for a liberty interest in "freedom from unnecessary restraint." (Complaint, ¶ 35.)

A. Do Plaintiffs Have a Protected Liberty Interest?

1. Least Restrictive Environment

A state statute creates a protected liberty interest when that interest is defined by mandatory language and a substantive standard. *Hewitt v. Helms*,

459 U.S. 460, 471-72 (1983) (Pennsylvania statutes and procedures setting forth procedures for confining an inmate to "administrative separation" created liberty interest in inmates remaining in the general prison population); *Woods v. Thieret*, 903 F.2d 1080, 1082 (7th Cir. 1990). In Count I, Plaintiffs contend that a liberty interest in receiving treatment in the least restrictive environment is created by Ill. Rev. Stat. ch. 91.5, ¶ 2-102(a), which states that "a recipient of services shall be provided with adequate and humane care and services in the least restrictive environment." In support of Count I, Plaintiffs rely on *Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983).

In *Johnson*, criminal defendants who were found unfit to stand trial challenged DMHDD's practice of assigning all male USTs to the Chester Mental Health Center ("Chester"), a maximum security facility "significantly more restrictive than some other DMHDD facilities." *Id.* at 1205. Plaintiffs argued that this automatic restrictive assignment violated their due process rights because it was made without any hearing or other individual determination of their treatment needs. *Id.*

Under the Criminal Code, Ill. Rev. Stat. ch. 38, ¶ 104-17(b), the *Johnson* court noted, a criminal defendant found unfit to stand trial because of a mental deficiency could be placed in the

custody of the DMHDD. 701 F.2d at 1206 n.4. In 1977, the DMHDD began the practice of assigning all male USTs to Chester. Seventh Circuit concluded that this practice violated plaintiffs' procedural due process rights because plaintiffs were not provided with a hearing regarding their treatment needs prior to their placement in Chester. *Id.* at 1206-07. Defendants in *Johnson* did not challenge the specific procedures that had been ordered by the district court; thus, the Seventh Circuit's inquiry was limited to the scope of the liberty interest created by the Illinois Mental Health and Developmental Disabilities Code ("Mental Health Code"), Ill. Rev. Stat. ch. 91-1/2 § 2-102 (1981), which provided for

treatment "in the least restrictive environment." 701 F.2d at 1206. The court reasoned that Section 2-102 of the Mental Health Code was applicable to plaintiffs, who, having been remanded to the custody of DMHDD for treatment pursuant to paragraph 104-17(b) of the Criminal Code, are considered "recipients of services" under Section 1-123 of the Mental Health Code. Finally, the court noted that the Illinois legislature intended that the Criminal and Mental Health Codes together would govern a UST's treatment and confinement. The court based this observation on paragraph 104-29 of the Criminal Code, which states that in the event of a conflict with the Mental Health Code, the Criminal Code provision

shall apply. 701 F.2d at 1206. Because Section 2-102 of the Mental Health Code did not conflict with the Criminal Code, USTs were, in the court's judgment, entitled to treatment in the "least restrictive environment." *Id*.

Although the *Johnson* case provides authority for Plaintiffs' argument that state law prohibits Defendants' suspension of Plaintiffs' pass privileges without a hearing, the Seventh Circuit recently diluted the protections provided in Section 2-102. In *Maust v. Headley*, 959 F.2d 644, 648 (7th Cir. 1992), the court held that Section 2-1023 no longer provides forensic patients with a liberty interest in receiving treatment in the least restrictive environment. In

Maust, a criminal defendant found unfit to stand trial claimed that his liberty interest in receiving treatment in the least restrictive environment was violated when he was not granted a hearing prior to his transfer to a more secure mental health center. *Id.* at 646. Invoking *Johnson*, the criminal defendant in *Maust* asserted that Section 2-102 should be construed to create a liberty interest in being confined in the least restrictive setting. *Id.* at 647.

In *Maust*, however, the Seventh Circuit did not agree that Section 2-102 created a liberty interest in the least restrictive environment. The *Maust* court found that amendatory provisions in paragraphs 104-17(b) and 104-31 of

the Illinois Criminal Code, enacted after *Johnson*, eliminated a defendant's liberty interest in the least restrictive environment.[7] *Id.* at 648. Specifically, the amendatory provision in paragraph 104-17(b) provides:

> If the defendant is placed in the custody of the Department of Mental Health and Developmental Disabilities, the defendant shall be placed in a secure setting unless the court determines that there are compelling reasons why such placement is not necessary.

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[7] Because the plaintiffs in both *Johnson* and *Maust* were USTs, paragraph 104-17(b) of the Criminal Code establishes their general treatment plan and paragraph 104-31 governs the extent to which they must be escorted by Department personnel when they are outside a facility building. Ill. Rev. Stat. ch. 38, ¶ 104-17(b) and ¶ 104-31.

Ill. Rev. Stat. ch. 38, ¶ 104-17(b).[8] Examining Section 2-102 of the Mental Health Code in light of 104-17(b) of the Criminal Code, the *Maust* court believed it "highly unlikely that the Illinois General Assembly intended to create a right to be confined in the 'least estrictive, secure environment.'" 959 F.2d at 648. The court also noted that the "degree of supervision" over defendants governed by paragraph 104-31 "would scarcely qualify as that found in the 'least restrictive environment.'"

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[8] Although paragraph 104-17 of the Criminal Code applies only to defendants found unfit to stand trial, the same "secure setting" language is contained in a companion amendment, paragraph 1005-2-4, added after *Johnson*, that applies to defendants found not guilty by reason of insanity. Seventh Circuit's decision in *Maust*, therefore applies to the universe of plaintiffs in the proposed class.

Id.[9] The court then stated that any conflicts between the Mental Health Code and the Criminal Code "must be resolved in favor of the Criminal Code." *Id.* The court based this assertion on Ill. Rev. Stat. ch. 38 ¶ 104-29, which provides that "in the event of any conflict between this Article and the 'Mental Health and Developmental Disabilities Code,' the provisions of this Article shall govern." The court also noted that in the title to the

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[9] Paragraph 104-31 provides in part: "No defendant placed in a secure setting . . . shall be permitted outside the facility's housing unless escorted or accompanied by personnel of the Department of Mental Health and Developmental Disabilities. Nor shall such defendant be permitted any off-grounds privileges . . . or on-grounds privileges, unless such . . . privileges have been approved by specific court order." Ill. Rev. Stat. ch. 38, ¶ 104-31.

legislation amending paragraph 104-17 of the Criminal Code, "the Mental Health Code is expressly listed as one of the statutes affected by the legislation." *Id*.

Plaintiffs cite *Yiadom v. Kiley*, 204 Ill. App.3d 418, 562 N.E.2d 310 (1st Dist. 1990), for the proposition that *Johnson* remains good law. In *Yiadom*, a habeas corpus petition was brought seeking the release from the Department of a defendant found unfit to stand trial. *Id*. at 422, 562 N.E.2d at 312. In considering whether the inmate was denied due process by the Department regarding his treatment plan, the Illinois appellate court cited *Johnson* and observed that "defendants adjudged unfit to stand trial have a state-

created liberty in treatment in the least restrictive environment." *Id.* at 428, 562 N.E.2d at 316. *Yiadom's* precedential value is compromised, however, by the fact that, although the case was decided after the amendments to paragraphs 104-17 and 104-31, there is no mention of these amendments in the court' analysis. *Yiadom* court paid little heed to the issue of whether defendants had a liberty interest in the least restrictive environment. Instead, after citing *Johnson* the *Yiadom* court proceeded directly to a discussion of what process was due. Seventh Circuit in *Maust*, in contrast, engaged in a reasoned analysis of whether defendants retained a liberty interest in the least restrictive environment. *Maust*,

therefore, deserves greater precedential value than *Yiadom*. Under controlling authority, Plaintiffs here appear to have no state-created liberty interest in receiving treatment in the "least restrictive environment," and cannot pursue a claim for injunctive relief to enforce any such interest.

2. Adequate and Humane Care

In Court II, Plaintiffs argue that the suspension of their passes constituted a violation of their state-created liberty interest in receiving adequate and humane care pursuant to an individualized service plan. Paragraph 2-102 of the Mental Health Code provides that "a recipient of services shall be provided with adequate and humane care . . . pursuant to an individual service

plan." Ill. Rev. Stat. ch, 91.5, ¶ 2-102(a). As previously noted, a statute creates a liberty interest when that interest is defined by mandatory language and a substantive standard. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). Paragraph 20102 satisfied the *Hewitt* standard because it uses mandatory language ("shall") and substantive standard ("adequate and humane care").

Defendants do not dispute that Plaintiffs have a liberty interest in receiving adequate and humane care pursuant to an individualized service plan. Defendants argue, however, that this right was not violated when the passes were suspended.

Illinois does not recognize pass privileges as a mandatory form of mental health treatment. This is evident from the provision authorizing the issuance of passes. Section 1005-2(b) of the Criminal Code provides:

> The defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges . . . unsupervised on-grounds privileges, discharge or conditional or temporary release, except by a plan as provided in this Section . . . such plan may also include unsupervised on-grounds privileges, off-grounds privileges . . . but only where such privileges have been approved by specific court order.

Ill. Rev. Stat. ch. 38 ¶ 1005-2(b). Thus, a defendant may have pass privileges but only if granted by court order. *See generally* People v. Reed, 126 Ill. App.3d 1020, 467 N.E.2d 1158 (2nd Dist. 1984). Where the Illinois

legislature did not make pass privileges mandatory, it could not have intended to make pass privileges a required component of adequate and humane care in Illinois.

The case histories of Nelson and Manos further demonstrate that pass privileges are not required for adequate and humane care at Elgin. Plaintiffs' pass privileges were revoked on May 30, 1990 and have never been reinstated. In the meantime, Manos was released from the custody of DMHDD and Nelson was recommended for conditional release from Elgin to a half-way house. Thus, even without their passes, Manos successfully completed treatment for his mental illness and Nelson has taken a significant step toward completion.

This progress in Manos' and Nelson's mental health demonstrates that they have received adequate and humane treatment without pass privileges. improvement in the named Plaintiffs' mental health, which took place without passes, bears witness to the fact that they did receive adequate and humane treatment. Thus, Plaintiffs' claim that the pass suspension violated their right to receive adequate and humane treatment must fail.

3. **Reasonable Freedom of Movement**

In Count III, Plaintiffs raise their strongest constitutional challenge: they allege that the suspension of their passes violated their constitutional right to reasonable freedom of movement. Defendants do not

dispute that Plaintiffs have a liberty interest in freedom from unreasonable restraint. They argue, however, that the decision by DMHDD to suspend the passes did not constitute an unreasonable restraint on Plaintiffs' movement.

Supreme Court has recognized that "freedom from bodily restraint has always been the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 112 S.Ct. 1780, 1785 (1992). This liberty interest in freedom from bodily restraint survives involuntary commitment. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). This interest is not absolute; there are occasions when the state has a legitimate interest in restraining the

movement of individuals placed in its institutions. *Id.* at 320. In seeking to balance these interests, an individual's liberty interest must be weighed against the state's asserted reasons for restraining liberty. *Id.* Supreme Court has established that the appropriate standard to apply in balancing these two interests is whether professional judgment was exercised prior to the restraint. *Id.* at 324.

The right of an institutionalized inmate to freedom from unnecessary restraint was articulated by the Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the mother of a profoundly retarded adult filed suit against the state institution in which her son was confined, claiming that the

state defendants had infringed her son's constitutional rights to safe conditions of confinement, freedom from bodily restraint, and training. *Id.* at 309, 310. Plaintiff asserted, specifically, that her son's right to be free from bodily restraint was violated when institution staff restrained him by applying what the Court referred to as "soft" restraints to his arms. *Id.* at 311.

The *Youngberg* Court recognized the right to freedom from bodily restraint and established that this right "must also survive involuntary confinement." *Id.* at 316. Court then articulated a standard to balance this liberty interest against legitimate state concerns for public safety and effective

treatment. Under this standard, the Court concluded, the state "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training." *Id.* at 324.

Defendants insist that *Youngberg* does not control the outcome here. They note that *Youngberg* involved actual physical restraint; here, Defendants' action only imposes limitations on Plaintiffs' movement within the institution. Defendants correctly observe the degree of physical restraint was more severe in *Youngberg* than in the present case. They err, however, in assuming that the Supreme Court's holding in *Youngberg* hinged upon the

unique degree of physical restraint in that case. The Supreme Court's recent opinion in *Foucha v. Louisiana*., 112 S.Ct. 1780 (1992), demonstrates that the right to liberty from bodily restraint means more than simply a prohibition against actual physical restraint of the body.

In *Foucha*, petitioner had been acquitted of aggravated battery and illegal discharge of a firearm by reason of insanity. He was committed to a psychiatric hospital pursuant to Louisiana law. Four years later, a hospital review committee recommended that he be conditionally discharged. Two court-appointed doctors refused to certify that plaintiff was no longer dangerous, however, and the state trial

court denies his release. This result comported with Louisiana law which required that a defendant found not guilty by reason of insanity be committed to a psychiatric hospital until he can prove that he is not dangerous, regardless of the current diagnosis of his mental condition. 112 S.Ct. at 1781.

The Supreme Court struck down the Louisiana statute as unconstitutional. 112 S.Ct. at 1787. A majority of the Court concluded that the statute violated the Sue Process Clause because it allowed an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any

mental illness. *Id*. In so holding, the Court recognized that freedom from bodily restraint is a liberty interest that applies to insanity acquittees, *Id*. at 1785 *(citing Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)), and that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Id*. at 1785, (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). Thus, Plaintiffs enjoy a liberty interest in freedom of movement that need not be limited to freedom from actual physical restraint of the body.

Further support for Plaintiffs' argument that they have a liberty interest in freedom of bodily movement is provided by the Seventh Circuit's

decision in *Johnson v. Brelje*, 701 F.2d at 1201.[10] In addition to arguing that they had an interest in receiving treatment in the "least restrictive environment," plaintiffs in *Johnson* argued that they had a liberty interest in freedom of movement. Plaintiffs attached the DMHDD's practice of confining them indoors except on rare occasions. *Id.* at 1208. Citing *Youngberg*, the *Johnson* court held that the plaintiffs "retain liberty interests in freedom from such restraints [confinement indoors]." *Id.*

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[10] Although the Seventh Circuit in *Maust* overruled *Johnson's* discussion of Section 2-102 and the "least restrictive environment," *Johnson's* consideration of the restrictions that DMHDD placed on forensic patients' freedom of movement remains good law.

Plaintiffs clearly have a constitutionally protected liberty interest in freedom of movement. Plaintiffs must also establish, however, that the DMHDD's suspension of their passes constituted a violation of that liberty interest. This determination requires a balancing of Plaintiffs' liberty interest in freedom of movement against DMHDD's legitimate interest in restraining their movement for the safety of Plaintiffs themselves and the general public. In balancing these interests, *Youngberg* directs that the court make certain that DMHDD exercises professional judgement in deciding that restraint of Plaintiffs through suspension of their passes is necessary to assure safety. 457 U.S. 324.

DMHDD suspended Plaintiffs' passes on May 30, 1990 after two forensic patients used their unsupervised grounds passes to escape from Elgin. In a memo written to all of the state court judges who had approved passes, Defendant Brelje explained that the Department was temporarily suspending all unsupervised grounds passes pending the completed construction of a security fence. Dr. Brelje explained that utilization of the passes under existing conditions "presented an unacceptable danger, both to the individual recipients and the community at large." (Defendants' Response to Plaintiff's Motion for Preliminary Injunction, Ex. E.) Plaintiffs emphasize that one of these escapees was apprehended quickly and the

other had warned Elgin staff of his intention to flee prior to his escape. Further Plaintiffs have presented statistical data which they believe demonstrated there had been no increase in the number of NGRIs or USTs escaping from confinement during exercise of pass privileges over many months prior to May 1990. Nevertheless, for purposes of the preliminary injunction proceeding, this court will assume that DMHDD's initial suspension of the passes was reasonable because a professional decision (albeit not an individualized one) was made that restricting Plaintiffs' freedom of movement promoted legitimate safety concerns.

By March 1991, however, a security fence completely enclosed the forensic

unit. Once the security fence was completed, continued suspension of Plaintiffs' passes no longer represented a reasonable restriction on Plaintiffs' freedom of movement. As early as July 1990, Department staff had made written recommendations to the Circuit Court that Plaintiffs Manos and Nelson (and other forensic patients) have their pass privileges restored upon the completion of the fence. After the fence was built, however, Plaintiffs' pass privileges were not restored. This unnecessary restriction of Plaintiffs' movement is precisely the type of arbitrary state action that the Due Process Clause was intended to prevent. Department staff did, as required by *Youngberg*, make a professional

determination that Plaintiffs should have their passes restored. But the Department never did restore them. Defendants provide no rational explanation why Plaintiffs should not now enjoy the same freedoms they had prior to the suspension of pass privileges. Prior to the original issuance of passes, the Department completed a three-tier determination that Plaintiffs Nelson and Manos did not present a security threat to themselves or the public.[11] Further the Department's release of Manos and its recommendation that Nelson be

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[11] As described in paragraph 5 of the Findings of Fact, *supra*, before a forensic patient receives a pass, the patient's treatment team, Dr. Marquez, and Roalda Alderman must determine that the patient is not a security risk.

conditionally released to a half-way house demonstrate that the Department itself recognizes that both Manos and Nelson can responsibly exercise freedom. The Department's failure to restore Plaintiffs' passes after the completion of the fence unreasonably restricted Plaintiffs' liberty interest in freedom of movement.

B. Were Plaintiffs Deprived of Their Liberty Interest Without Adequate Due Process Protection?

The second step in examining Plaintiffs' "likelihood of success" is to determine whether Defendants afforded Plaintiffs adequate due process protection of their liberty interest in the passes. Due process is "a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S.

113, 127 (1990). A court must weigh several factors to determine what procedural protections are required in a particular case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, an the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In applying this test, the Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon*, 494 U.S. at 127.

1. **Plaintiffs' Interest**

Plaintiffs have a substantial private interest in their passes. For Plaintiffs, the reasonable freedom of movement enjoyed by the passes constitutes a liberty interest , which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha* , 112 S.Ct. at 1785.

Additionally, all of the potential Plaintiffs suffer from debilitating mental illness. The extent of Plaintiffs' suffering is such that they have been adjudicated either unfit to stand trial or incapable of forming criminal intent. Plaintiffs argue that their passes constitute a form of therapeutic treatment and that

suspension of those passes detrimentally affects Plaintiffs' well-being and recovery. Specifically, they argue that Defendants' program allowing increasingly greater freedoms -- referred to by mental health professionals as "progressive liberties" -- is itself a recognized form of treatment.

Defendants challenge the notion that progressive liberties are necessary or required for effective mental health care. They contend no empirical data supports a conclusion that progressive liberties accelerate a patient's progress. Dr. Brelje testified in fact, that it may be that allowing patients increasing freedoms over a period of several months actually slows the pace

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analysis requires an examination of "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards." 424 U.S. at 355. As previously discussed, Plaintiffs' liberty interest in their passes outweighed Defendants' claimed security needs, at the latest after the fence was built. Thus, the procedures employed by Defendants in determining whether to restore Plaintiffs' passes after construction of the fence must be examined in order to assess the risk that Plaintiffs were erroneously denied pass privileges.

As noted earlier, Defendants appear to have failed to act upon their own

recommendation that pass privileges be restored upon completion of construction of the fence. Not only did Defendants bar Plaintiffs from wandering the full range of the Elgin facility, as they had prior to May 1990; but Defendants also have not allowed patients having unsupervised grounds passes to walk without supervision for more than five minutes, even within the fenced area. Consequently, Defendants' procedures erroneously denied Plaintiffs their liberty interest.

The second prong of the *Mathews* analysis also requires a determination of "the probable value, if any, of additional or substitute procedures safeguards." *Id.* at 335. Plaintiffs here request that prior to any future

suspension of pass privileges, a qualified professional make an individualized determination that the patient no longer meets the criteria for a pass. In case of an emergency, Plaintiffs propose that Defendants be entitled to suspend a pass without a prior determination, as long as that determination is made promptly after the suspension.

The circumstances of Plaintiffs Nelson and Manos demonstrate the probable value of requiring Defendants to make a pre-deprivation individual determination that a plaintiff no longer qualifies for a pass. On May 30, 1990, Defendants suspended the passes of Nelson and Manos without having made such a determination. After conducting

a professional individualized determination only two months later, however, Defendants' decided that Plaintiffs Nelson and Manos should have their passes restored. Had Defendants based their initial decision on an individualized review of Plaintiffs' treatment needs, Plaintiffs Nelson and Manos might never have lost their passes.

3. **Government's Interest**

The third prong of the *Mathews* analysis required that the probable value of any additional safeguards be weighed against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail." *Id.* Defendants here argue that adoption of Plaintiffs' suggestions would require burdensome and expensive hearing prior to any decision to suspend passes.

Defendants' argument fails to acknowledge, however, that an appropriate mechanism for conducting a pre-deprivation hearing already exists. Paragraph 1005-2-4(b) of the Criminal Code, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b), requires Defendants to submit a individualized treatment plan to the Circuit Court for each forensic patient every 60 days. Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b). Since ¶ 1005-2-4(b) already requires Defendants to conduct a professional individualized determination before suspending a

Plaintiff's pass privileges, Defendants incur no additional cost or burden in providing a pre-deprivation hearing.

Significantly, Plaintiffs' request for an individual determination imposes a lesser procedural burden on the Department than the requirement which the Seventh Circuit recently imposed on the Wisconsin prison system in *Felce v. Fiedler*, _____ F.2d _____, No. 91-3488, 1992 WL 221989 (7th Cir. Sept. 15, 1992). In *Felce*, a mandatory parolee argued that Wisconsin cannot condition mandatory release parole on forced injections of antipsychotic drugs unless the drugs are necessary and a fair procedure is used to determine such a necessity. 1992 WL 221989, at *3. The *Felce* court held that a parolee has a

liberty interest "in being free from the involuntary use of antipsychotic drugs during his period of mandatory parole." *Id.* at *10. After determining that plaintiff had a liberty interest in refusing medication, the court considered what procedural protections were necessary to protect the liberty interest. The court determined "that the involvement of an independent decisionmaker [in deciding whether the antipsychotic medication was necessary] would benefit significantly the protection of the liberty interest at stake without a significant burden upon . . . the state . . . . *Id.* at *10. In contrast to the request in *Felce*, Plaintiffs here are not requesting that Defendants be forced to supply an

independent decisionmaker in determining whether Plaintiffs qualify for pass privileges. Instead, Plaintiffs merely ask that the pass privilege determinations be made by the same persons who are involved in their day-to-day treatment and who are required to develop individual treatment plans every 60 days.

Conceivably, an emergency could arise prior to the required 60-day hearing that would necessitate the suspension of pass privileges without a prior individualized determination. But even in such an emergency, due process requires the provision of some kind of a hearing as soon as practical after the deprivation has occurred. *Parratt v. Taylor* 451 U.S. 527, 538 (1981). Thus,

in the event Defendants are forced to impose an emergency suspension of pass privileges, due process requires that Defendants conduct an individualized determination within the next 60-day interval.

C. **Remaining Preliminary Injunction Requirements**

As Plaintiffs have demonstrated they are likely to succeed on the merits of their due process claim, the court must consider whether the other requirements for granting of preliminary injunctive relief have been met. Specifically, Plaintiffs must demonstrate that they are likely to suffer irreparable harm for which they have no adequate remedy at law if injunctive relief is denied; that the

harm they will suffer is greater than the burden that injunctive relief would impose on Defendants; and that such relief will not jeopardize the public interest. *Faheem-El v. Klincar*, 841 F.2d 712, 716 (7th Cir. 1988). Defendants have raised no genuine objection to any of the remaining elements of the required showing.

Plaintiffs easily meet the first of these requirements, establishing that if the injunction is denied, they will suffer irreparable harm for which they have no adequate remedy at law. *Faheem-El*, 841 F.2d at 716. Depriving Plaintiffs of their passes is likely to inflict irreparable harm. Because Plaintiffs received their passes after Defendants' determination that the

passes constituted an appropriate part of Plaintiffs' individual treatment plans to provide adequate and humane care, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b) and ch. 91.5, ¶ 2-102, any deprivation of Plaintiffs' passes may interfere with Plaintiffs' treatment. Since Plaintiffs cannot be released until they recover, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(h), inteference with their treatment resulting from the suspension of passes may prolong their confinement.

Additionally, Plaintiffs do not have an adequate remedy at law for the irreparable harm that deprivation of their passes may inflict upon them. Monetary damages, for example, will be difficult to calculate. Nor can such

damages make Plaintiffs "whole," if the suspension of passes does interfere with Plaintiffs' treatment and delay recovery. Although Plaintiffs did request an award of damages,[12] it would be difficult to set a price tag on the satisfaction Plaintiffs felt upon learning that their passes would entitle them to some degree of freedom of movement or the disappointment they experienced when their freedom was suspended.

Next, Plaintiffs must establish that denial of the injunction would

---

[12] Plaintiff Manos contends he is entitled to an award for pay he lost as a result of his inability to work as a forklift operator, but the evidence did not permit a finding on this issue. Manos did not recall whether he was working in that job at the time of the pass suspension.

inflict greater suffering on them than the burden such relief, if granted, would impose on Defendants. *Faheem-El*, 841 F.2d at 716. Defendants do not dispute that Plaintiffs have met this burden. If the injunction is granted, Defendants will return to the practice they followed prior to the supervision of passes on May 30, 1990. Every 60 days, Defendants will be required to make individual determinations regarding each patient's qualifications for receiving a pass. On the other hand, denial of the injunction threatens harm to Plaintiffs. The passes are part of their treatment plan, and Plaintiffs' recovery and eventual release from DMHDD may be delayed if the pass privileges are not restored.

Finally, Plaintiffs must establish that the injunction will not disserve the public interest. *Id*. Defendants argue that if the passes are restored, public safety will be at risk. Defendants have already discharged Manos, however, and have recommended Nelson for conditional release to a half-way house. These determinations demonstrate that Defendants no longer regard Plaintiffs Nelson and Manos as threats to public safety. Moreover, Illinois law and Department practice contemplate the use of passes as a form of treatment. *See* Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b). Restoration of the passes may enhance Plaintiffs' treatment; and the injunctive relief they have requested will not disserve

the public interest.

CONCLUSION

Defendants' suspension of Plaintiffs' pass privileges on May 30, 1990 violated Plaintiffs' constitutionally protected liberty interest in freedom from unreasonable restraint on bodily movement. The court should grant Plaintiffs' motion for a preliminary injunction requesting issuance of an order restoring all passes suspended on May 30, 1990 and requiring an individualized professional determination prior to any future suspension of the passes.

ENTER:

_____

REBECCA R. PALLMEYER
United States Magistrate Judge

Date: September 30, 1992

Within ten days of the date of service of this report, Plaintiffs are directed to submit to the Honorable John A. Nordberg their proposed form preliminary injunction order consistent with this Report. Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable John A. Nordberg. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

730 ILCS 5/5-2-4. Proceedings After Acquittal by Reason of Insanity

(a) After a finding or verdict of not guilty by reason of insanity under Sections 104-25, 115-3 or 115-4 of The Code of Criminal Procedure of 1963, the defendant shall be ordered to the Department of Mental Health and Developmental Disabilities for an evaluation as to whether he is subject to involuntary admission or in need of mental health services. The order shall specify whether the evaluation shall be conducted on an inpatient or outpatient basis. If the evaluation is to be conducted on an inpatient basis, the defendant shall be placed in a secure setting unless the Court determines that there are compelling reasons why such placement is not necessary. After the evaluation and during the period of time required to determine the appropriate placement, the defendant shall remain in jail. Upon completion of the placement process the sheriff shall be notified and shall transport the defendant to the designated facility.

The Department shall provide the Court with a report of its evaluation within 30 days of the date of this order. The Court shall hold a hearing as provided under the Mental Health and Developmental Disabilities Code to determine if the individual is: (a) subject to involuntary admission; (b) in need of mental health services on an inpatient basis; (c) in need of mental health services on an outpatient basis;

(d) a person not in need of mental health services. The Court shall enter its findings.

If the defendant is found to be subject to involuntary admission or in need of mental health services on an inpatient care basis, the Court shall order the defendant to the Department of Mental Health and Developmental Disabilities. The defendant shall be placed in a secure setting unless the Court determines that there are compelling reasons why such placement is not necessary. Such defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted or accompanied by personnel of the Department of Mental Health and Developmental Disabilities or with the prior approval of the Court for unsupervised on-grounds privileges as provided herein. If the defendant is found to be in need of mental health services, but not on an inpatient care basis, the Court shall conditionally release the defendant, under such conditions as set forth in this Section as will reasonably assure the defendant's satisfactory progress in treatment or rehabilitation and the safety of the defendant or others. If the Court finds the person not in need of mental health services, then the Court shall order the defendant discharged from custody.

(1) Definitions: For the purposes of this Section:

(A) "Subject to involuntary admission" means: A defendant has been

found not guilty by reason of insanity; and

(i) who is mentally ill and who because of his mental illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or (ii) who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm.

(B) "In need of mental health services on an inpatient basis means: a defendant who has been found not guilty by reasons of insanity who is not subject to involuntary admission but who is reasonably expected to inflict serious physical harm upon himself or another and who would benefit from inpatient care or is in need of inpatient care.

(C) "In need of mental health services on an outpatient basis" means: a defendant who has been found not guilty by reasons of insanity who is not subject to involuntary admission or in need of mental health services on an inpatient basis, but is in need of outpatient care, drug and/or alcohol rehabilitation programs, community adjustment programs, individual, group, or family therapy, or chemotherapy.

(D) "Conditional Release" means: the release from the custody of either the Department of Mental Health and Developmental Disabilities or the custody of the Court of a person who has been found not guilty by reasons of insanity under such conditions as the court may

impose which reasonably assure the defendant's satisfactory progress in treatment or habilitation and the safety of the defendant and others. The Court shall consider such terms and conditions which may include, but need not be limited to outpatient care, alcoholic and drug rehabilitation programs, community adjustment programs, individual, group, family, and chemotherapy, periodic checks with the legal authorities and/or the Department of Mental Health and Developmental Disabilities. The person or facility rendering the outpatient care shall be required to periodically report to the Court on the progress of the Defendant. Such conditional release shall be for a period of five years, unless the defendant, the person or facility rendering the treatment, therapy, program or outpatient care, or the State's attorney petitions the Court for an extension of the conditional release period of an additional three years. Upon receipt of such a petition, the Court shall hold a hearing consistent with the provisions of this paragraph (a) and paragraph (f) of this Section, shall determine whether the defendant should continue to be subject to the terms of conditional release, and shall enter an order either extending the defendant's period of conditional release for a single additional three year period or discharging the defendant. In no event shall the defendant's period of conditional release exceed eight years. These provision for extension of conditional release shall only apply to defendants conditionally released on or after July 1, 1979. However the

extension provisions of this amendatory Act of 1984 apply only to defendants charged with a forcible felony.

(b) If the Court finds the defendant subject to involuntary admission or in need of mental health services on an inpatient basis, the admission, detention, care treatment or habilitation, review proceedings, and discharge of the defendant after such order shall be under the Mental Health and Developmental Disabilities Code, except that the initial order for admission of a defendant acquitted of a felony by reasons of insanity shall be for an indefinite period of time. Such period of commitment shall not exceed the maximum length of time that the defendant would have been required to serve, less credit for good behavior, before becoming eligible for release had he been convicted of and received the maximum sentence for the most serious crime for which he has been acquitted by reasons of insanity. The Court shall determine the maximum period of commitment by an appropriate order. During this period of time, the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges, with or without escort by personnel of the Department of Mental Health and Developmental Disabilities, unsupervised on-grounds privileges, discharge or conditional or temporary release, except by a plan as provided in this Section. In no event shall a defendant's continued unauthorized absence be a basis for discharge. Not more than 30 days after

admission and every 60 days thereafter so long as the initial order remains in effect, the facility director shall file a treatment plan with the court. Such plan shall include an evaluation of the defendant's progress and the extent to which he is benefiting from treatment. Such plan may also include unsupervised on-grounds privileges, off-grounds privileges (with or without escort by personnel of the Department of Mental Health and Developmental Disabilities), home visits and participation in work programs, but only where such privileges have been approved by specific court order, which order may include such conditions on the defendant as the Court may deem appropriate and necessary to reasonably assure the defendant's satisfactory progress in treatment and the safety of the defendant and others.

(c) Every defendant acquitted of a felony by reason of insanity and subsequently found to be subject to involuntary admission or in need of mental health services shall be represented by counsel in all proceedings under this Section and under the Mental Health and Developmental Disabilities Code.

(1) The court shall appoint as counsel the public defender or an attorney licensed by this State.

(2) Upon filing with the court of a verified statement of legal services rendered by the private attorney appointed pursuant to paragraph (1) of this subsection, the court shall

determine a reasonable fee for such services. If the defendant is unable to pay the fee, the court shall enter an order upon the State to pay the entire fee or such amount as the defendant is unable to pa from funds appropriated by the General Assembly for that purpose.

(d) When the facility director determines that:

(1) the defendant is no longer subject to involuntary admission or in need of mental health services on an inpatient basis; and

(2) the defendant may be conditionally released because he or she is still in need of mental health services or that the defendant may be discharged as not in need of any mental health services; or

(3) the defendant no longer requires placement in a secure setting; the facility director shall give written notice to the Court, State's Attorney and defense attorney. Such notice shall set forth in detail the basis for the recommendation of the facility director, and specify clearly the recommendations, if any, of the facility director, concerning conditional release. Within 30 days of the notification by the facility director, the Court shall set a hearing and make a finding as to whether the defendant is:

(i) subject to involuntary admission; or

(ii) in need of mental health services in the form of inpatient care;

or

(iii) in need of mental health services but not subject to involuntary admission or inpatient care; or

(iv) no longer in need of mental health services; or

(v) no longer requires placement in a secure setting.

Upon finding by the Court, the Court shall enter its findings and such appropriate order as provided in subsection (a) of this Section.

(e) A defendant admitted pursuant to this Section, or any person on his behalf, may file a petition for transfer to a non-secure setting within the Department of Mental Health and Developmental Disabilities or discharge or conditional release under the standards of this Section in the court which rendered the verdict. Upon receipt of a petition for transfer to a non-secure setting or discharge or conditional release, the court shall set a hearing to be held within 30 days. Thereafter, no new petition may be filed for 60 days without leave of the court.

(f) The court shall direct that notice of the time and place of the hearing be served upon the defendant, the facility director, the State's Attorney, and the defendant's attorney. If requested by either the State or the defense or if the Court feels it is appropriate , an impartial examination of the defendant by a psychiatrist or clinical psychologist as defined in Section 1-103 of the Mental Health and

Developmental Disabilities Code who is not in the employ of the Department of Mental Health and Developmental Disabilities shall be ordered, and the report considered at the time of the hearing.

(g) The findings of the court shall be established by clear and convincing evidence. The burden of proof and the burden of going forth with the evidence rest with the State when a hearing is held to review the determination of the facility director that the defendant should be transferred to a non-secure setting, discharged or conditionally released. The burden of proof and the burden of going forth with the evidence rest on the defendant when a hearing is held to review a petition filed by or on behalf of such defendant. The evidence shall be presented in open court with the right of confrontation and cross-examination.

(h) If the court finds that the defendant is no longer in need of mental health services it shall order the facility director to discharge the defendant. If the Court finds that the defendant is in need of mental health services, and no longer in need of inpatient care, it shall order the facility director to release the defendant under such conditions as the Court deems appropriate and as provided by this Section. Such conditional release shall be imposed for a period of five years and shall be subject to later modification by the court as provided by this Section. If the court finds that

the defendant is subject to involuntary admission or in need of mental health services on an inpatient basis, it shall order the facility director not to discharge or release the defendant in accordance with paragraph (b) of this Section.

(i) If within the period of the defendant's conditional release, the court determines, after hearing evidence, that the defendant has not fulfilled the conditions of release, the court shall order a hearing to be held consistent with the provision of paragraph (f) and (g) of this section. At such hearing, if the court finds that the defendant is subject to involuntary admission or in need of mental health services on an inpatient basis, it shall enter an order remanding him or her to the Department of Mental Health and Developmental Disabilities or other facility. If the defendant is remanded to the Department of Mental Health and Developmental Disabilities, he or she shall be placed in a secure setting unless the court determines that there are compelling reasons that such placement is not necessary. If the court finds that the defendant continues to be in need of mental health services but not on an inpatient basis, it may modify the conditions of the original release in order to reasonably assure the defendant's satisfactory progress in treatment and his or her safety and the safety of others. In no event shall such conditional release be longer than eight years. Nothing in this Section shall limit a court's contempt powers or any

other powers of a court.

(j) An order of admission under this Section does not affect the remedy of habeas corpus.

(k) In the event of a conflict between this Section and the Mental Health and Developmental Disabilities Code or the Mental Health and Developmental Disabilities Confidentiality Act, the provision of this Section shall govern.

(l) This amendatory Act shall apply to all persons who have been found not guilty by reasons of insanity and who are presently committed to the Department of Mental Health and Developmental Disabilities.

(m) The Clerk of the court shall, after the entry of an order of transfer to a non-secure setting of the Department of Mental Health and Developmental Disabilities or discharge or conditional release, transmit a certified copy of the order to the Department of Mental Health and Developmental Disabilities, and the sheriff of the county from which the defendant was admitted. In cases where the arrest of the defendant or the commission of the offense took place in any municipality with a population of more than 25,000 persons, the Clerk of the court shall also transmit a certified copy of the order of discharge or conditional release to the proper law enforcement agency for said municipality provided the municipality has requested

such notice in writing.

Supreme Court, U.S.
FILED
NOV 13 1995
OFFICE OF THE CLERK

No. 94-2053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

v.

WILLIAM MURPHY, Acting Director, Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a federal court abstain under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971) from ordering state mental health officials to restore a previously-held grounds pass to an institutionalized person found not guilty by reason of insanity or to pay damages for the allegedly unconstitutional termination of the grounds pass where the sentencing court has statutory authority to oversee pass privileges and where proceedings were pending in state criminal court to determine the contours of the individual's pass privileges?

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No. 94-2053

IN THE

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WILLIAM MURPHY, Acting Director, Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on January 4, 1995 (App. A-1). The petitioners filed a timely petition for rehearing with suggestion for rehearing en banc, to which the respondents filed an answer pursuant to court order. The panel majority denied the petition for rehearing in a written addendum

to its decision on March 13, 1995, finding that no judge in active service voted for rehearing en banc (App. A-14). The Petition was filed in this Court on June 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioners

In 1981, the Circuit Court of Cook County, Illinois, Criminal Division ("the criminal court"), found Wayne Nelson not guilty of murder by reason of insanity (R. Doc. 16, exhibit A-4). In 1986, the criminal court found Anthony Manos not guilty of attempted murder by reason of insanity (R. Doc. 16, exhibit B-5). Both Nelson and Manos were ordered committed to a facility of the Illinois Department of Mental Health and Developmental Disabilities ("the Department") (R. Doc. 16, exhibits A-3 and B-4). On March 30, 1993, the Illinois Appellate Court ordered the circuit court to enter an order permitting the Elgin Mental Health Center to conditionally release Nelson. *People v. Nelson*, 244 Ill. App. 3d 356, 614 N.E.2d 277 (1st Dist. 1993). By order of the criminal court, Manos was released from Elgin in December of 1990 (Tr. 6-3-92, pp. 174-175, 196-201).

Illinois Statutory Provisions Governing The Criminal Court's Supervision of Persons Found Not Guilty By Reason of Insanity

The Illinois Unified Code of Corrections provides that after a finding of not guilty by reason of insanity, the defendant shall be ordered to the Department for an evaluation to determine whether he is subject to involun-

tary admission or in need of mental health services. 730 ILCS 5/5-2-4(a) (1994). The Department shall provide the court with a report of its evaluation within thirty days of the court's order. *Id.* If the defendant is found to be subject to involuntary admission or in need of mental health services on an inpatient care basis, the court shall order the defendant to the Department for placement in a secure setting. *Id.* Defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted or accompanied by Department personnel or with the prior approval of the court for unsupervised on-grounds privileges. *Id.*

During the period of commitment, the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges or unsupervised on-grounds privileges, except as provided by a treatment plan filed with the court. 730 ILCS 5/5-2-4(b) (1994). The facility director shall file such treatment plan with the court not more than thirty days after admission and every sixty days thereafter so long as the initial admission order remains in effect. *Id.*

Such plan shall include an evaluation of the defendant's progress and the extent to which he is benefitting from treatment. *Id.* Such plan may also include unsupervised on-grounds privileges and supervised or unsupervised off-grounds privileges, but only where such privileges have been approved by specific court order. *Id.* The court's order may include such conditions on the defendant as the court may deem appropriate and necessary to reasonably assure the defendant's satisfactory progress in treatment and the safety of the defendant and others. *Id.*

Criminal Court Proceedings Relating To The Pass Privileges of Nelson and Manos

In September 1988, Nelson petitioned the criminal court for unsupervised grounds passes at Elgin (R. Doc. 16, exhibit A-2). The criminal court granted Nelson's motion, allowing him to attend certain on-grounds programs at various days and times (*Id.*). The criminal court further ordered that Nelson's attendance at the programs be monitored, that no unsupervised on-grounds passes be given if Nelson failed to report promptly to each program or if any violent behavior was documented or if his medical records did not show that he took his medication, and that the criminal court be notified within one hour of any nonreporting to a program or to Nelson's unit (*Id.*).

In December 1988, the criminal court ordered that on-grounds unsupervised passes be allowed for Nelson with the proviso that on-grounds activities personnel report back to Nelson's unit when he arrives for the activity, that off-grounds supervised passes be allowed two times per month, and that Nelson not be allowed a home visit until further order of the criminal court (R. Doc. 16, exhibit A-1).

On January 22, 1988, the criminal court granted Manos's motion for an unsupervised on-grounds pass (R. Doc. 16, exhibit B-3). In July 1989, Manos filed a motion for unsupervised home visits and supervised off-grounds passes (R. Doc. 16, exhibit B-2). The criminal court ordered the Psychiatric Institute of Cook County to examine Manos to determine whether such visits and passes should be granted (*Id.*). In September 1989, the criminal court granted Manos's motion for supervised

off-grounds passes and denied his motion for home visits (R. Doc. 16, exhibit B-1).

In May 1990, two persons found not guilty by reason of insanity escaped from Elgin (Tr. 6-3-92, p. 218). On May 30, 1990, William Murphy, then the Acting Director of the Department, made the decision to suspend all passes for those persons at Elgin who were found not guilty by reason of insanity or who were found unfit to stand trial (Tr. 6-3-92, pp. 211, 221). Also on May 30, 1990, Nancy Foster, Director of Court Services at Elgin, telephoned the Chief Judge of the Circuit Court of Cook County to inform him of the suspension of passes (Tr. 6-4-92, pp. 452-457).

Roalda Alderman, facility director at Elgin, wrote to Judge John Manion at the criminal court regarding Nelson (R. Doc. 16, exhibit E). Alderman wrote a similar letter to Judge Jack Welfeld regarding Manos (*Id.*). The letters advised the court of the new procedure instituted for requesting grounds passes and revised clinical guidelines for determining whether a forensic recipient is clinically appropriate for pass privileges (*Id.*). The letters also stated that "we understand a hearing will now be scheduled for the purpose of resolving the grounds pass issue." (*Id.*). The letters asked the judges to send writs authorizing the Department to transport Nelson and Manos to the court (*Id.*).

Accompanying the letters were memorandums regarding the Department's new procedure for requesting grounds passes (R. Doc. 16, exhibit E, memorandums from Terry Brelje, then the Deputy Director for Southern Facility Operations and Special Programs, to circuit court judges). The new procedure consists of review of the treatment team's recommendation that a pass be

granted by a psychiatrist or psychologist, by the facility director, and by the director of forensic programs for the Department (*Id.*). The court then decides whether to approve a pass (*Id.*).

The explanation of the new procedure stated that "[t]he granting of a ground pass to a forensic recipient is a very critical responsibility that must simultaneously balance the needs to protect society and be responsible to the individual's clinical needs." (R. Doc. 16, exhibit E, memorandums from Brelje to circuit court judges). A pass for the simple purpose of being "on the campus" shall be granted only under the most carefully considered conditions and would be "relatively uncommon." (*Id.*). An on-grounds pass for the purpose of attending a program activity as part of the treatment plan "might be more commonly granted." (*Id.*).

The circuit court judges also were provided with a memorandum from Brelje notifying them of the administrative decision to temporarily restrict all forensic recipients' unsupervised grounds passes pending the construction of a security perimeter fence (R. Doc. 16, exhibit E, memorandum from Brelje to circuit court judges). The memorandum stated that the Department had made an administrative decision to build a perimeter fence to enclose the forensic buildings, the baseball field, and a significant area of open space (*Id.*). The judges also were informed that the recipients who are clinically approved for unsupervised grounds passes would have those passes restored upon completion of the fence (*Id.*). The memorandum also stated that such individuals, while unsupervised, will still be on grounds inside the perimeter fence and that until completion of the perimeter fence, the Department was of the opinion that the utilization of un-

supervised grounds passes by forensic recipients at Elgin presents an unacceptable danger, both to the individual recipients and the community at large (*Id.*).

On June 20, 1990, the treatment team reviewed Nelson's pass privileges and recommended that he be able to use his passes when appropriate structured activities are available to him in the future (R. Doc. 18, exhibit F, pp. 5-8). According to a letter from Nancy Foster, Director of Court Services at Elgin, to Stuart Katz, Nelson's attorney at the time, Nelson instructed Katz not to proceed with a court hearing in the matter of restoration of his pass privileges and that Nelson was "comfortable with" the Department's recommendation (R. Doc. 22, exhibit D; *see also* R. Doc. 24, exhibit E, affidavit of Nelson).

On June 15, 1990, the treatment team reviewed Manos's pass privileges and recommended that his privileges be reinstated with focus on unsupervised day passes and home visits with discharge as a goal (R. Doc. 18, exhibit G, pp. 2-5). On July 18, 1990, Alderman informed Brelje that she concurred with the review conducted by Manos's clinical team and non-treating professional staff that his pass privileges be reinstated in accordance with the memorandum regarding the fence enclosure of the Forensic Treatment Program (R. Doc. 18, exhibit G).

Circuit court hearings were held between July 1990 and October 1991 on the restoration of passes (Tr. 6-4-92, pp. 459-462). For example, on October 4, 1990, the court ordered Charles Bullock's on-grounds pass temporarily revoked for a period of ninety days (R. Doc. 22, exhibit C). The court also ordered that Cameil Britton's on-grounds pass be temporarily suspended until further

order of the court (*Id.*). The court denied the Department's motion to suspend Curtis Littrice's on-grounds pass and ordered Littrice to have a supervised off-grounds pass and an unsupervised on-grounds pass, which was subject to suspension if his behavior was not appropriate (*Id.*). The record also shows that the Department recommended that unsupervised pass privileges be reinstated for Charles Johnson, but that the implementation of such privileges be held in abeyance until the completion of the perimeter fence (R. Doc. 24, exhibit F).

On August 6, 1990, the temporary suspension of unsupervised off-grounds passes was lifted for those persons who were clinically approved to exercise this privilege (R. Doc. 16, exhibit D). After the passes were temporarily suspended, recipients of passes continued to engage in clinically appropriate activities outside of the Forensic Treatment Building, both on and off of the facility grounds (*Id.*).

On March 11, 1991, upon completion of the fence, on-grounds passes were restored (Tr. 6-4-92, p. 302). Forensic patients at Elgin can now use their unsupervised on-grounds passes for the purpose of moving from their housing unit to an activity in another building (Tr. 6-4-92, p. 304).

District Court Proceedings

On July 11, 1990, Nelson and Manos filed a complaint pursuant to 42 U.S.C. §§ 1983 and 1988 on behalf of themselves and others similarly situated (R. Doc. 1). They alleged that the defendants violated their due process rights by failing to provide them with an individualized determination as to whether they continued to

meet the standard for a pass, by failing to provide them with a hearing prior to the deprivation of their liberty, and by deciding to suspend the passes without evaluation by a qualified professional (R. Doc. 1, p. 6).

The plaintiffs sought an injunction directing the defendants to restore their on-grounds passes and off-grounds passes and to refrain from depriving them of their passes in the future in the absence of a hearing that complies with due process (R. Doc. 1, pp. 6, 8-9). They also sought monetary damages in the amount of $50,000 for each member of the class (R. Doc. 1, pp. 7-9).

In response to the plaintiffs' motion for a preliminary injunction for restoration of all passes that were suspended in May 1990, the defendants argued, *inter alia*, that the district court should abstain from exercising its jurisdiction (R. Doc. 10; R. Doc. 16, pp. 9-14). On July 23, 1993, the magistrate recommended partial summary judgment in favor of the defendants on the basis of qualified immunity (R. Doc. 95). The plaintiffs filed objections to the report and recommendation (R. Doc. 97).

On March 9, 1994, the district court issued an order dismissing the complaint without prejudice based on its decision to abstain from exercising jurisdiction under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (R. Docs. 98 and 99). The court denied on grounds of mootness the plaintiffs' motions for class certification and for a preliminary injunction (*Id.*).

Decision of the Court of Appeals

The panel majority affirmed the district court's decision to abstain; however, it concluded that abstention under the doctrine announced in *Younger v. Harris*, 401 U.S. 37

(1971) applied to this matter. 44 F.3d 497 (7th Cir. 1995). The majority noted that the staff at Elgin filed new treatment plans with the court for both Nelson and Manos every sixty days and that they could have opposed the implementation of the new plans on constitutional grounds in the state courts. 44 F.3d at 501. The majority found that the petitioners filed their federal court action rather than presenting their objections to the treatment plans. *Id.* Noting the petitioners' apparent dissatisfaction with the relief that state courts had given to other Elgin inmates, the majority stated that such dissatisfaction did not "justif[y] carting one's claim off to federal court." 44 F.3d at 502.

The majority found that the petitioners were trying to annul the result of treatment plans to which they made no objection in the state courts and that the petitioners did not claim that any of the *Younger* exceptions were applicable to the case. *Id.* The majority concluded that the petitioners had and did not use a state forum in which they could have presented the arguments presented in the federal court and that, under these circumstances, *Younger* was appropriate. *Id.* On March 13, 1995, the court denied the petition for rehearing. 44 F.3d at 504-505.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT MAJORITY PANEL CORRECTLY ABSTAINED FROM EXERCISING JURISDICTION BECAUSE THERE WERE ONGOING PROCEEDINGS IN THE STATE COURT IMPLICATING IMPORTANT STATE INTERESTS AND BECAUSE THE PROCEEDINGS AFFORDED THE PETITIONERS AN ADEQUATE OPPORTUNITY TO RAISE THEIR FEDERAL CONSTITUTIONAL CHALLENGES.

This matter is perfectly appropriate for abstention under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). Based on principles of comity and federalism, the *Younger* doctrine applies when there are ongoing state judicial proceedings, where the state proceedings implicate important state interests, and where the state proceedings afford an adequate opportunity to raise federal constitutional challenges. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). This matter implicates the policies, interests, and conditions supporting *Younger* abstention, as the majority correctly concluded.

Under section 5-2-4 of the Unified Code of Corrections, a circuit court judge maintains jurisdiction over a person found not guilty by reason of insanity (NGRI) that he or she commits to an inpatient mental health facility. 730 ILCS 5/5-2-4 (1994). By statute, the treatment plan, which is filed with the circuit court every sixty days, includes an evaluation of the NGRI's progress and may also include unsupervised on-grounds privileges and off-grounds privileges, but only where such privileges have been approved by specific court order. 730 ILCS 5/5-2-4(b) (1994).

After the Petitioners' passes were temporarily suspended pending the completion of the fence at the Elgin Mental Health Center, the Department scheduled hearings before the criminal court judges for the explicit purpose of resolving the pass issue. As the Seventh Circuit majority found, "[n]o one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised in this litigation." *Nelson*, 44 F.3d at 501.

Where the statutory scheme grants the circuit court judges ongoing jurisdiction over pass privileges, where hearings were pending in the circuit court for the express purpose of resolving the pass issue, and where the Petitioners' arguments could have been presented in the state court proceedings, the majority correctly held that abstention was appropriate under the doctrine announced in *Younger*. The Petitioners have failed to show either that the majority decision requires review by the Court or that there are any conflicts between the Seventh Circuit and other circuits that need resolution by the Court. Under these circumstances, the petition should be denied.

A. The Pending State Proceedings Regarding Pass Privileges Involve Important State Interests.

In *Younger*, the Court held that principles of federalism and comity require district courts to abstain from granting relief whenever doing so would interfere substantially with ongoing state judicial criminal proceedings. 401 U.S. at 45. The *Younger* doctrine has expanded to include civil proceedings. *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975),

reh'g denied, 421 U.S. 971 (1975). Central to *Younger* is the recognition that ours is a system in which the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44. *Younger* reflects a strong policy against federal court interference in pending state judicial proceedings absent extraordinary circumstances. *Middlesex*, 457 U.S. at 431.

As the majority correctly stated, "[t]he principle of *Younger* is that a party to a state proceeding affecting important governmental interests must resolve the dispute in the state's preferred tribunal." *Nelson*, 44 F.3d at 501. The inquiry focuses on the importance of the generic proceedings to the State, not its interest in the outcome of a particular case. *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989). States have a substantial interest in enforcing criminal laws that bear a close relationship to criminal proceedings. *Huffman*, 420 U.S. at 604.

The majority panel noted that the "cases pending in the courts of Illinois are continuations of the original criminal prosecutions, and preserving a state's right to litigate criminal cases in its own courts is the core of the *Younger* doctrine." *Nelson*, 44 F.3d at 501. Contrary to the Petitioners' illogical contention, the majority's observation that the state proceedings are continuations of the original criminal prosecutions does not mean that the confinement of insanity acquitees is part of a scheme of punishment. (*See* Petition at 29-32). The majority's conclusion correctly recognized the fact that those persons found not guilty by reason of insanity are subject to the

criminal laws of Illinois. This point was made clear in *People v. Roush*, 101 Ill. 2d 355, 462 N.E.2d 468, 472 (1984), where the Illinois Supreme Court stated that "a circuit court judge maintains jurisdiction over an NGRI patient he or she commits to a mental institution." *See also People v. Valdez*, 79 Ill. 2d 74, 402 N.E.2d 187, 193 (1980) (provisions in the Unified Code outlining the circuit court's jurisdiction enable the circuit court to monitor the progress of the treatment being rendered by the Department to a person found not guilty by reason of insanity).

State judicial oversight of the treatment and confinement of NGRIs serves important governmental interests, and the Petitioners do not dispute this. Provisions of the Unified Code of Corrections, together with provisions of the Mental Health and Developmental Disabilities Code, make it clear that the purpose of the circuit court's ongoing jurisdiction is to help ensure both an NGRI's satisfactory progress in treatment and the safety of an NGRI and others. *See* 405 ILCS 5/3-814 (1994); 730 ILCS 5/5-2-4(b) (1994).

While an NGRI's treatment includes various components, the Illinois legislature has found that pass privileges are of such importance that it explicitly gave the circuit courts of Illinois ongoing jurisdiction over this aspect of treatment and confinement. Section 5-2-4 of the Unified Code states that during the period of confinement, "the defendant shall not be permitted to be in the community in any manner, including but not limited to off-ground privileges, with or without escort by personnel of the Department of Mental Health and Developmental Disabilities, unsupervised on-grounds privileges, discharge or conditional or temporary release except by a

plan provided in this Section." 730 ILCS 5/5-2-4(b) (1994). The facility director shall file with the court a treatment plan, which may include unsupervised on-grounds privileges and off-grounds privileges, but only where such privileges have been approved by specific court order. *Id.*

The Petitioners argue that *Younger* does not apply because they were not defendants in any pending state court proceeding. (Petition at 18-23). They ignore the facts of this case showing not only that the sentencing judge has ongoing jurisdiction over their pass privileges, but that the Department had scheduled hearings to resolve the pass issue that arose after passes were temporarily suspended.

The pending state court hearings were held in furtherance of enforcement of the Unified Code, which mandates that the facility director file treatment plans with the criminal court and that pass privileges can only be given by order of the court. In this regard, this matter is readily distinguishable from *Harris v. Pernsley*, 755 F.2d 338 (3rd Cir. 1985), *reh'g denied*, 758 F.2d 83, *cert. denied*, 474 U.S. 965 (1985), where no state criminal proceedings were pending. (*See* Petition at 18-19). The *Harris* court found that, although a civil case initiated by state prisoners was pending in the state court of common pleas involving issues similar to the federal suit, abstention was not appropriate because the government officials were not plaintiffs or prosecutors seeking vindication of state law enforcement policies in the state court action. Thus, because the state court action was not a criminal proceeding and did not involve state law enforcement policies, the *Harris* court concluded that the government's interest in the state action was not strong

enough to merit *Younger* abstention. 755 F.2d at 344. Here, on the other hand, the federal defendants' actions in the pending state court proceedings involved the state's interest in its law enforcement policies and furthered enforcement of the Unified Code of corrections.

The Petitioners' assertion that state proceedings were not pending is simply untrue. In addition to the statutory requirement that the Department file treatment plans with the circuit court sentencing judge every sixty days and the statutory mandate that only the circuit court can order pass privileges, the facts of this record show that hearings were indeed held beginning in July 1990 on pass privileges after passes were temporarily suspended in May 1990 due to the escape of two NGRIs from Elgin. When the decision to suspend passes was made, Department personnel immediately telephoned the Chief Judge of the Circuit Court of Cook County to inform him of the decision (Tr. 6-4-92, pp. 452-457). Thereafter, letters were written to criminal court judges advising them of the new procedures and guidelines applicable to the issuance of passes (R. Doc. 16, exhibit E). The letters also stated that "we understand a hearing will now be scheduled for the purpose of resolving the grounds pass issue." (*Id.*). The letters asked the judges to send writs authorizing the Department to transport Nelson and Manos to the court (*Id.*).

Federal court exercise of jurisdiction in this case would have constituted substantial interference with the pending state court proceedings. The consideration of *Younger* cannot be separated from the realities of this case. Although the Petitioners seem to have forgotten the relief they sought from the federal court, the facts show that they asked the federal court to order the defendants to

restore the pass privileges they had prior to the temporary suspension of passes. Had the district court granted the injunction, this order would have substantially interfered with the circuit court's ongoing statutory duty and authority to determine whether passes should be granted and to determine the perimeters of the passes. In this regard, this matter is clearly distinguishable from *Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), where the court rejected *Younger* without analysis, stating merely that the case "represents no interference or intervention in state judicial processes—criminal or otherwise." (*See* Petition at 23-24).

This Court has stated that the object of abstention is to "sustain '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own laws.' " *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). So long as challenges relate to pending state proceedings, proper respect for the ability of state courts to resclve federal questions presented in state court litigation mandates that the federal court stay its hand. *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Where pass privileges of NGRIs is a subject affecting important governmental interests and where the circuit courts of Illinois statutorily maintain ongoing jurisdiction over this aspect of treatment and confinement, the majority correctly applied the *Younger* doctrine under the facts of this case.

B. The Plaintiffs Had The Opportunity To Present Their Constitutional Claims In The Pending State Proceedings.

The facts of record make clear that the plaintiffs could have raised their constitutional claims regarding the suspension of old passes and the restrictions on new passes at the hearings held before the circuit court judges. "No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327 (1977).

There is a presumption that state courts are as capable as federal courts of guaranteeing federal rights. *See Swain v. Pressley*, 430 U.S. 372, 383 (1977) ("[E]lected judges of our state courts are fully competent to decide federal constitutional issues . . . ."). Thus, the *Younger* abstention doctrine does not become inapplicable simply because the plaintiff alleges federal constitutional violations. *Moore v. Sims*, 442 U.S. 415, 427 n.10 (1979). Plaintiffs "need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." *Juidice*, 430 U.S. at 337.

A federal plaintiff cannot escape *Younger's* reach merely by abandoning the pending state action and by failing to assert its state remedies in a timely manner. *Pennzoil*, 481 U.S. at 18 n.16. The burden of showing that there is no opportunity to raise constitutional claims in the state court rests with the federal plaintiff. *Moore*, 442 U.S. at 432. The Petitioners have never claimed that they could not have raised their constitutional claims in the state proceedings.

The Petitioners simply decided to bypass the opportunity that state courts allowed them to litigate these issues and chose instead to bring their claims into federal court. As the majority panel correctly noted, "the

Supreme Court long ago held that parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends." *Nelson*, 44 F.3d at 502 (citing *Huffman*, 420 U.S. at 607-611). The failure of the Petitioners to avail themselves of the opportunity to pursue their claims in the state proceedings does not mean that those proceedings were inadequate. *Juidice*, 430 U.S. at 337.

Contrary to the Petitioners' assertion, the majority's decision does not conflict with cases such as *Gerstein v. Pugh*, 420 U.S. 103 (1975) or *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), where the issues involved could not have been raised in the state proceedings and *Younger* then did not apply. (*See* Petition at 25-27, 32-35). In *Gerstein*, the Court found that the legality of the pretrial detention was an issue that could not be raised in defense of the criminal prosecution. 420 U.S. at 108 n.9. In *LaShawn A.*, the court found that family court proceedings did not present an appropriate forum for a multi-faceted class action challenge to the entire state foster care system. 990 F.2d at 1323. Here, on the other hand, the pending state proceedings, held for the purpose of determining the issue of pass privileges, gave the Petitioners an adequate, even a perfect, opportunity to raise the constitutional challenges that they raised in federal court.

The Petitioners' contention that the majority's decision is in conflict with *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980) is erroneous. (Petition at 34-35). In *Coley*, two former inmates of an Arkansas state hospital sought to represent a class of criminal defendants committed to the state hospital when found incompetent to stand trial or when acquitted by reason of mental disease. They alleged

constitutional violations relating to the procedures for commitment to and release from the state hospital and to the automatic confinement in a maximum security building.

The Petitioners fail to mention that the *Coley* court determined that abstention was compelled by *Younger* as to state judicial action involved in the commitment and release of criminal defendants. 635 F.2d at 1371. The court also found that abstention was proper under the doctrine announced in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941) as to the constitutional challenges to the administrative procedures for commitment and release. The court rejected the application of *Younger* for those claims relating to administrative procedures because there were no ongoing criminal court proceedings with which a challenge to state administrative inaction would have interfered. Here, on the other hand, there were ongoing proceedings in the Illinois criminal court governed by the Unified Code. The Petitioners fail to accurately present the *Coley* decision, and their argument that the majority's decision conflicts with *Coley* is simply untrue.

The majority noted that both Nelson and Manos have been released from confinement, but found that this fact did not mean that abstention was not applicable. *Nelson*, 44 F.3d at 502. The majority was correct. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *reh'g denied*, 421 U.S. 971 (1975), the Court found that *Younger* applied where a plaintiff attempts to annul the results of a state trial. The Court held that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies[,]" regardless of whether those rem-

edies continue to be available. *Huffman*, 420 U.S. at 609 and n.22; *see also O'Neill v. City of Philadelphia*, 32 F.3d 785 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1355 (1995) (a state proceeding is considered "pending" and *Younger* abstention proper where the adjudicatory process has become final as a result of the federal claimant's failure to pursue state court judicial review of an unfavorable state administrative determination).

The Petitioners distort the majority's decision by arguing that the court improperly imposed an exhaustion of remedies requirement on their case. (Petition at 27-28). The Petitioners appear to confuse exhaustion of state appellate remedies with the well-settled rule that a party bringing a section 1983 action need not exhaust state remedies. The majority noted the distinction between the concepts that the Petitioners confuse when it stated that an inmate participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent section 1983 action, but "[t]his is not at all to create an exhaustion requirement for conditions of confinement litigation under section 1983." *Nelson*, 44 F.3d at 502. There is no such requirement under *Felder v. Casey*, 487 U.S. 131 (1988) and *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Id.*

The principle expressed by the majority is consistent with this Court's views that a state's judicial system would not be accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the state's appellate courts. *Huffman*, 420 U.S. at 609. Thus, the *Huffman* Court concluded that the *Younger* standards may not be avoided "by simply failing to comply with the procedures

for perfecting [an] appeal[,]" and, in this regard, it was not essential to ascertain whether appellate remedies continued to be available. *Huffman*, 420 U.S. at 609 n.22. The majority noted the principle expressed in *Huffman* when it stated that "parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends." *Nelson*, 44 F.3d at 502. Contrary to the Petitioners' assertion, the majority's decision does not conflict with decisions of this Court.

The Petitioners have failed to ever argue that they did not have the opportunity to raise their constitutional challenges in the state court proceedings. Similarly, their petition fails to show that the majority panel erred in concluding that the opportunity existed for them to raise their claims. Under these circumstances and where the Petitioners have failed to show any conflict with other decisions, review of the majority's decision is not warranted.

II.

THE PETITIONERS' PREDICTIONS THAT THE SEVENTH CIRCUIT'S DECISION WILL PRODUCE DIRE AND WIDE-RANGING CONSEQUENCES ARE UNREALISTIC.

The Petitioners present their case to this Court as one involving generically "conditions of confinement" in order to bolster their assertion that this case will foreclose a federal forum to "thousands" of institutionalized persons across this country. (Petition at 35-42). They overstate the scope of the decision, and their presentation ignores the narrow factual context within which this case arose.

Inherent in the Seventh Circuit's decision is the recognition that a pass privilege is the only aspect of confinement that the Illinois legislature explicitly mentioned in the Unified Code as being subject to the criminal court's ongoing jurisdiction. The determination of whether an NGRI is given a pass and what restrictions will be placed on the pass is such a significant state interest that the Unified Code expressly provides that the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges or unsupervised on-grounds privileges, except as provided by a treatment plan filed with the court. 730 ILCS 5/5-2-4(b) (1994).

Not only are pass privileges the subject of treatment plans filed with the criminal court every sixty days, but here, in fact, hearings were pending for the very reason of resolving the pass privilege issue, the precise issue that the Petitioners brought in federal court. While other states may also provide for judicial supervision of certain institutionalized persons, that does not mean that the decision of the Seventh Circuit will effectively close the federal courthouse door to all persons confined to institutions in the United States, as the Petitioners suggest. The majority's decision is consistent with the principles announced in *Younger*, and it does not create a bar to federal litigation to all persons who are subject to the criminal or civil commitment laws of the states. The Petitioners' attempt to secure review by predicting unrealistic and drastic results must be rejected.

III.

THE SEVENTH CIRCUIT MAJORITY'S DECISION DID NOT APPLY, EXPAND, OR CONFLICT WITH *HECK v. HUMPHREY* BECAUSE THE PETITIONERS WERE NOT CHALLENGING THE FACT OR DURATION OF THEIR CONFINEMENT.

The Petitioners argue both that the Seventh Circuit majority improperly extended the holding of *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364 (1994) and that the majority's dismissal of the claim for damages conflicts with *Heck*. (Petition at 42-55). Neither of the inconsistent contentions made by the Petitioners is correct. In *Heck*, this Court held that in order to recover damages for an allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must show that the conviction or sentence has been reversed. 114 S. Ct. at 2372. When a state prisoner seeks damages in a section 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction and, if it would, must dismiss the complaint unless the plaintiff can show that the conviction has been invalidated. *Id.*

The Petitioners misread the majority's decision, which mentioned the holding of *Heck* and then noted simply that *Younger* supports a "complementary" holding for conditions of confinement that are actively supervised by state courts in that an inmate already participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent §1983 suit. *Nelson*, 44 F.3d at 502. The Petitioners contend that they are not challenging the

fact or duration of their confinement. (Petition at 51-52). No one, including the majority panel, disputes that. Moreover, nothing in the majority's discussion improperly applies, expands, or conflicts with *Heck*, contrary to the Petitioners' suggestion. The Petition should be denied.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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NO. 94-2053

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WAYNE NELSON and **ANTHONY MANOS**, Individually and on behalf of all others similarly situated,

Petitioners,

v.

WILLIAM MURPHY, Acting Director Department of Mental Health and Developmental Disabilities; **ROALDA J. ALDERMAN**, Facility Director, Elgin Mental Health Center; **TERRY BRELJE**, Associate Director for Forensic Services, Department of Mental Health and Developmental Services,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

Petitioners brought this case to challenge the unilateral decision of Respondents to dramatically restrict Petitioners' liberty within a state mental hospital. A divided panel of the Seventh Circuit affirmed a district court decision dismissing Petitioners' claim on Younger abstention grounds. Respondents attempt to describe this decision in a way which minimizes conflict between the Seventh Circuit's holding and decisions of other circuits. They mischaracterize an unrelated proceeding in state court to deny that the Seventh Circuit has greatly expanded the reach of Younger. They rely on that proceeding -- and an inapplicable Illinois statute -- to dispute that the Seventh Circuit's application of Younger threatens federal court jurisdiction

over claims brought by thousands of institutionalized persons. Finally, they deny that the Seventh Circuit's application of Heck v. Humphrey conflicts with that or other decisions by this Court. For the reasons that follow these contentions are legally and factually unsupportable.

I. *YOUNGER* ABSTENTION IS INAPPROPRIATE BECAUSE NO ILLINOIS COURT WAS INVOLVED IN RESPONDENTS' TERMINATION OF PETITIONERS' GROUNDS PASSES.

Respondents argue that Younger abstention is proper in this case because federal jurisdiction would interfere with Illinois state court decisions regarding grounds passes. See Respondents' Brief at 12, 15, 17; Younger v. Harris, 401 U.S. 37 (1971). That argument misstates the facts of the case. Grounds passes were summarily terminated by the unilateral action of

Respondents. No state court ever approved, or had the opportunity to approve, Respondents' decision.

On May 30, 1990, William Murphy, then-Acting Director of the Department of Mental Health and Developmental Disabilities, terminated all grounds passes for approximately 75 patients at the Elgin Mental Health Center, patients who were committed after being found not guilty by reason of insanity (NGRI). A-58.[1] Prior to the termination, those patients, including Petitioners, had been granted unsupervised on-grounds passes. A-53, 56.

In the months following the termination of passes, Respondents recommended that some of these patients be granted new, more limited, grounds

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[1]Citations are to the Appendix to the Petition for Writ of Certiorari.

passes.[2] A-60. These patients were each given a state court hearing on the question of whether new passes should be granted. Respondents disingenuously note that the "Department had scheduled hearings to resolve *the pass issue* that arose after passes were temporarily suspended." Respondents' Brief at 15 (emphasis added). The "pass issue" addressed in those hearings was the appropriateness of new passes proposed by Respondents, not the appropriateness of Respondents' termination of old passes.

No hearings were ever held on the question of whether Respondents' termination of passes was unlawful. Under Illinois law, state courts must

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[2]Grounds passes recommended prior to May, 1990, allowed patients to walk unsupervised on the 80-acre Elgin campus. A-61. New passes were limited to no more than five minutes of unsupervised travel from one building to another. A-60-61.

approve passes recommended by the Department before those passes are granted to NGRI patients. 730 ILCS 5/5-2-4(b). Illinois law does not require the Department to obtain judicial approval in order to terminate patients' grounds passes. Nor did Respondents seek judicial approval of their own accord. Therefore, state "law enforcement policies and furthered enforcement of the Unified Code of [C]orrections" do not justify Younger abstention. See Respondents' Brief at 16.

Petitioners concede that Younger abstention might be applicable had Respondents' termination of grounds passes been litigated in state court. However, Illinois law does not require judicial review of termination of passes, and no such review was ever

held.

Contrary to Respondents' suggestion, Harris v. Pernsley, 755 F.2d 338 (3rd Cir. 1985), reh'g denied, 758 F.2d 83, cert. denied, 474 U.S. 965 (1985), cannot be distinguished on the grounds that Respondents have a substantial interest in state court adjudication. See Respondents' Brief at 15-16. As in Harris, the Respondents are not "plaintiffs or prosecutors seeking vindication of state law enforcement policies," see 755 F.2d at 344. Respondents have instigated no litigation in any state court seeking vindication of any state policy concerning the termination of Petitioners' passes.

Nor can Harris be distinguished on the grounds that "the state court action [in Harris] was not a criminal

proceeding." Respondents' Brief at 15. Despite the suggestion of Respondents, see Respondents' Brief at 13-14, 16, and the Seventh Circuit, see Nelson v. Murphy, 44 F.3d 497, 501 (1995)("cases pending in the courts of Illinois are continuations of the original criminal prosecutions"), proceedings to determine the treatment of NGRIs are not criminal in nature. NGRIs are civilly confined by the same procedures as all other involuntarily-committed patients. 730 ILCS 5/5-2-4(b). Respondents have not contested that Illinois has disavowed any intention to treat judicial supervision of NGRIs as a "criminal proceeding." See Petition for Certiorari at 31-32.

The nature of the state court proceedings demonstrates why granting relief to Petitioners would not result

in federal intrusion in state court proceedings. Respondents argue that success on Petitioners' claims would result in federal court "interfer[ence] with the state courts' ongoing statutory duty and authority." Respondents' Brief at 17 (distinguishing Hanna v. Toner, 630 F.2d 442 (6th Cir. 1980), cert. denied, 450 U.S. 919 (1981)). However, no state court, whether before or after the filing of Petitioners' claims, ever addressed the appropriateness of Respondents' termination of passes. Nor did any state court have a statutory duty to do so. A federal court decision regarding Petitioners' claims would not, therefore, interfere with the state courts. Indeed, if Respondents wished to give back the pre-May 1990 grounds passes to Petitioners at this date, they could do so without returning to state

court. State court approval of those passes has never been revoked.

Finally, the nature of the state court proceedings demonstrates why Respondents' argument is tantamount to an exhaustion requirement for § 1983. Respondents assert repeatedly that Petitioners should have brought their § 1983 claims in state court proceedings. Respondents' Brief at 18-22. In order for the state courts to address whether Respondents' termination of grounds passes was unconstitutional, however, Petitioners would have been required to bring their constitutional claims in that forum.[3] They could not have functioned as a defense to any

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[3]Respondents quite rightly note that "Petitioners have failed to ever argue that they did not have the opportunity to raise their constitutional challenges" in state court. Respondents' Brief at 22. Petitioners would not dispute that the Supremacy Clause requires state courts to entertain § 1983 actions. See Howlett v. Rose, 496 U.S. 356, 380 (1990).

"prosecution" by the state, since Respondents never litigated the termination of passes in state court. This Court has emphasized that the availability of an alternate forum is not grounds for Younger abstention. Felder v. Casey, 487 U.S. 131 (1988); Patsy v. Board of Regents, 457 U.S. 496 (1982). Respondents' proposed rule would vitiate that long-standing principle.

II. THE SEVENTH CIRCUIT'S DECISION WILL HAVE WIDESPREAD IMPACT BECAUSE STATE COURT SUPERVISION IN THIS CASE IS IDENTICAL TO STATE COURT SUPERVISION OVER THOUSANDS OF INSTITUTIONALIZED MENTAL PATIENTS.

Respondents attempt to distinguish the state courts' supervision over Petitioners from state court supervision over thousands of institutionalized persons in Illinois and other states. Respondents' Brief at 22-23. Respondents assert that this case arises

in a "narrow factual context" in which the state court involvement is different from the judicial supervision provided to all involuntarily-committed person in Illinois. Id. That assertion is erroneous.

If Respondents argue that the "significant state interest" in state court jurisdiction over this case arises from judicial supervision over the treatment plans of NGRI patients, their argument encompasses all involuntarily committed patients in Illinois. Illinois law provides for state court supervision of the treatment plans of NGRI patients. That supervision, however, is identical to the supervision given to every involuntarily committed patient. See 730 ILCS 5/5-2-4(b)(treatment "shall be under the Mental Health and Developmental

Disabilities Code"); 405 ILCS 5/3-814 (providing for judicial supervision and review of treatment plans for involuntarily committed patients). Were such judicial supervision the basis for Younger abstention, all patients involuntarily committed would be barred from bringing their conditions of confinement claims in federal court.

If Respondents' distinction rests on state court supervision over grounds passes of NGRI patients, it is factually irrelevant. Illinois does provide for state court approval prior to the granting of grounds passes to NGRI patients. 730 ILCS 5/5-2-4(b). However, Illinois law provides for no judicial supervision of termination of passes. Because Petitioners' claims challenge the termination of passes, rather than their granting, the

statutory provision invoked by Respondents cannot be a basis for distinction in this case.

Moreover, the argument that state court jurisdiction over a particular aspect of treatment justifies Younger abstention would affect thousands of civilly committed patients. Many states require judicial approval prior to particular forms of treatment. For example, Illinois -- like many other states -- requires judicial approval prior to administration of psychotropic medication to mental patients incapable of giving consent. 405 ILCS 5/2-107.1; see also Alaska Stat. § 47.30.839 (1995); N.Y. Mental Hyg. Law § 9.61(c)(2) (McKinney 1995); Okla. Stat. Ann. tit. 43A, § 5-401(B)(8) (West 1995); S.D. Codified Laws Ann. § 27A-12-3.15 (1995). Under Respondents'

argument, a patient who was forcibly administered medication without judicial approval would be barred from challenging the state's action in federal court despite the fact that this Court has ruled unanimously that patients have a constitutional right not to be subjected to involuntary medication. Washington v. Harper, 494 U.S. 210 (1990). That result sharply conflicts with Congressional intent that § 1983 provide a federal forum for constitutional claims.

III. THE SEVENTH CIRCUIT'S DECISION DEEPENS A SPLIT AMONG THE COURTS OF APPEALS ABOUT WHETHER *YOUNGER* IS APPLICABLE TO CLAIMS FOR MONETARY DAMAGES.

Respondents deny that the Seventh Circuit extended the holding of Heck v. Humphrey, ___ U.S. ___, 114 S. Ct. 2364 (1994). Respondents' Brief at 24. Respondents argue that the dismissal of

Petitioners' damages claims were based solely on Younger. Id. Although Petitioners disagree with Respondents' characterization of the Seventh Circuit's holding, Respondents' interpretation points to a compelling additional basis for granting certiorari. Application of Younger to damages claims is an issue on which the circuits are sharply divided, and one which this Court has heretofore declined to consider.

This Court has explicitly left open the question of whether Younger abstention applies to damages claims. Deakins v. Monaghan, 484 U.S. 193, 201 (1988); Juidice v. Vail, 430 U.S. 327, 339 n. 16 (1977). The Courts of Appeals are split on the issue. The Fifth Circuit applies a per se rule that claims for monetary damages do not fall

within the purview of Younger. See Alexander v. Ieyoub, 62 F.3d 709, 713 (5th Cir. 1995); Lewis v. Beddingfield, 20 F.3d 123, 125 (5th Cir. 1994); Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100, 104 (5th Cir. 1988). Both the Sixth and Ninth Circuits, in contrast, abstain under Younger where the action for damages would interfere with or implicate the outcome of pending state proceedings. See Feaster v. Miksch, 846 F.2d 21, 22-23 (6th Cir.), cert. denied, 488 U.S. 857 (1988); Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986). After noting conflicting approaches, the Fourth Circuit has held that Younger does not invariably require dismissal of damages claims. Suggs v. Mebane, 804 F.2d 274, 279 (4th Cir. 1986). The Tenth Circuit has similarly acknowledged the split in authority, and concluded

that -- although Younger may require abstention on damages claims in some circumstances -- dismissal is not required when those claims cannot be redressed in the pending state proceeding. Myers v. Garff, 876 F.2d 79, 81 (10th Cir. 1989).[4] Although the Eighth Circuit has not opined on the application of Younger to damages claims generally, it has held that "the principles of comity embodied in Younger also require the dismissal of . . . damages claims" when the "damage claims

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[4]As discussed, there was no proceeding in which the state court considered the propriety of the Department's termination of passes. Thus, the rule applied by the Sixth, Ninth, and Tenth Circuits would not bar Petitioners' damages claims. However, if the Seventh Circuit's holding is read to mean that Petitioners' damages claims are barred by their failure to initiate proceedings in the state court, see 44 F.3d at 501 ("Either plaintiff could have opposed the implementation of the new plan on constitutional grounds--or on the ground that the change in the pass policy violated the orders approving earlier treatment plans and thus constituted contempt of court."), then it is in conflict with every other opinion on this issue.

and . . . equitable claims are inextricably intertwined." Caldwell v. Camp, 594 F.2d 705, 708 (8th Cir. 1979).

Therefore, if Respondents are correct in arguing that Petitioners' damages claims were dismissed under Younger, rather than Heck, the Seventh Circuit's opinion further deepens the conflict between the Courts of Appeals and presents an important issue to be resolved by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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